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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin

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LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
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PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Wisconsin

The petitioners Lodge 76, International Association of Machinists and Aerospace Workers and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin entered in this case on March 4, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and reprinted in Appendix B annexed hereto (*infra*, p. A-2ff). The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are unreported but appear as Appendix C and Appendix D here (*infra*, p. A-15ff and p. A-22ff).

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on March 4, 1975. A timely petition for rehearing was denied on May 6, 1975 (Appendix A; *infra*, p. A-1), and this petition for certiorari was filed within 90 days thereafter.[1] The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does a state offend Article VI of the Constitution of the United States by applying local standards as to allowable collective bargaining weapons to outlaw peaceful, concerted refusals to work voluntary overtime for an employer in interstate commerce, a self-help activity permitted as part of the balance of power between labor and management as expressed in our national labor policy?

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[1] The petition is timely. Cf. *Department of Banking v. Pink*, 317 US 264, 266 (1942); *United States v. Healy*, 376 US 75, 78 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. § 141, *et seq.*) and of the Wisconsin Statutes (§ 111.06(2)(h)) are set out in Appendix E (*infra*, p. A-52ff).

STATEMENT OF THE CASE

Kearney & Trecker Corporation ("K & T" or "employer") is a Milwaukee area manufacturer of machine tools, engaged in interstate commerce and within the jurisdictional standards of the National Labor Relations Board. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO ("Lodge 76" or "Union") represents, with certain exceptions, all of K & T's hourly employees for purposes of collective bargaining and was party to a labor agreement with the Employer that, as terminable on and after February 28, 1971, was terminated on June 19, 1971. Under that agreement, and for the past 17 years, the basic work day for K & T's hourly employees was seven and one-half hours, Monday through Friday, for a basic work week of 37 and one-half hours. Hours worked in excess of the basic work day or basic work week were compensated at overtime rates. Acceptance of overtime work has always been voluntary, with the employee free to decline it.[2]

Negotiations for a successor labor agreement commenced in October, 1970, and were not concluded until July 23, 1972, when the new contract took effect. In bargaining the

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[2] App., pp. A-32, A-49. See, also, Appellant's Appendix in the Supreme Court of Wisconsin ("A. App."), pp. 154, 158.

Employer demanded that the basic work day and basic work week for hourly employees be lengthened to eight hours per day, Monday through Friday, and 40 hours per week, and that the terms on which overtime was payable be restricted accordingly. Lodge 76 refused to agree to this demand and, by June 22, 1971, the parties had reached impasse on this and certain other proposals. At that time, K & T unilaterally implemented certain changes in the conditions prescribed by the expired contract, including elimination of the check-off of Union dues, of the Union's office in the plant, and of Union lost-time.[3]

On March 1 and 3, 1972, although the parties were still at impasse on the matter, the Employer announced its decision to implement unilaterally, as of March 13, its work day, work week and overtime pay proposal. On March 7, in response thereto, the membership of Lodge 76 authorized its officers to request strike sanctions and unanimously enacted resolutions prohibiting any members from working any overtime.[4] On March 10 and 11, K & T made two proposals, the effect of which was temporarily to defer implementation of its proposed changes in work day, work week and overtime pay if the Union would agree that its membership could be forced to accept overtime work, or a prescribed amount thereof, each day. Lodge 76 rejected these proposals and its officials refused to ask the membership to rescind the resolution of March 7.

From March 7, 1972, until agreement on the new contract was reached, almost all members of the Union refused to accept daily or Saturday overtime work but otherwise con-

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[3] App., p. A-41; A. App., p. 157.

[4] Overtime was defined as work in excess of seven and one-half hours a day or 37 and one-half hours a week. App., pp. A-3, A-31, A-50.

tinued to perform their normal duties. Consequently, despite its earlier announcement to the contrary, K & T chose to postpone (but did not renounce) implementation of the proposed changes in work day, work week and overtime pay. Because acceptance of overtime work has always been voluntary, K & T did not impose any discipline on Lodge 76 members for refusing to work overtime after March 7, 1972.[5]

Instead, the Employer sought to end the concerted activity through legal action. On June 27, 1972, K & T's charge filed with the National Labor Relations Board that the Union's overtime ban violated § 8(b)(3) of the National Labor Relations Act ("Act"), 29 U.S.C. § 158(b)(3), was dismissed by the Regional Director on the ground that such conduct was not prohibited by the Act.[6] However, its complaint that the conduct constituted an unfair labor practice under state law, § 111.06(2)(h), Wis. Stats., was sustained by the Wisconsin Employment Relations Commission ("Commission") and, ultimately, by the Supreme Court of Wisconsin.

From the outset and at all subsequent stages of the litigation, petitioners raised in timely and proper fashion the federal question presented here. By motion to dismiss and then by affirmative defense in answer to the complaint, petitioners challenged state jurisdiction over the activity complained of as in conflict with the Act and therefore with the Constitution of the United States.[7] By express assignments of error in the petitions for Commission review of the Examiner's decision,[8] for review of the Commission's order by the Circuit Court

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[5] A. App., p. 158.

[6] Citing *NLRB v. Insurance Agents' International Union AFL-CIO*, 361 US 477 (1960).

[7] Summarized and discussed by the Examiner at App., p. A-38ff.

[8] Summarized and discussed by the Commission at App., p. A-23.

for Milwaukee County,[9] and in the appeal to the Supreme Court of Wisconsin,[10] petitioners renewed their preemption contentions.

The Commission concluded that state jurisdiction existed because the concerted activity was "not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8" of the Act[11] and was therefore subject to restraint under state law on the authority of this Court's decision in *Briggs-Stratton*.[12] The circuit court enforced the order, reasoning that the *Briggs-Stratton* holding with respect to "the kind of activity" here "has never been overruled" and that this Court would have to provide a "more definitive basis" than heretofore "[b]efore a provision of the Wisconsin Peace Act is declared a nullity."[13]

On appeal the Supreme Court of Wisconsin affirmed the judgment. Its opinion sustained state jurisdiction upon determinations that the Union's conduct was neither arguably protected nor arguably prohibited by the Act and that state prohibition of the activity was not "contrary to any legislative

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[9] This was the sole issue raised on review, App., p. A-16.

[10] This was the only question raised on appeal. App., p. A-5.

[11] App., p. A-33.

[12] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 US 245 (1949). App., p. A-46. The Commission concurred in the rationale that the "result" in *Briggs-Stratton* has survived this Court's repeated repudiation of its "approach". It reached this conclusion reluctantly. The Commission found "persuasive" the argument that this "allow[ed] the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme" but felt compelled to reject the argument based on the test formulated by this Court in *San Diego Building Trades Council v. Garmon*, 359 US 236 (1959). App., p. A-48.

[13] App. pp. A-20, A-19.

purpose" of the federal statute.[14] *Briggs-Stratton*, the court reasoned, was "authority" for the principle that Congress yielded plenary jurisdiction to the states to regulate what were termed "strike tactics."[15] This Court's *Morton*[16] decision that a state may not bar self-help weapons merely permitted but not "arguably protected" by § 7 of the federal statute was thought distinguishable because secondary pressures rather than "partial strikes" were involved. Regulation of partial strikes, the court below holds, is "left wholly to the states."[17]

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[14] App., p. A-14.

[15] App., p. A-10.

[16] *Local 20, Teamsters Union v. Morton*, 377 US 252 (1964).

[17] App., p. A-14.

REASONS FOR GRANTING THE WRIT

I. The Court Below Has Decided a Substantial and Important Federal Question Contrary to Applicable Decisions of the Court.

A. The Federal Question.

Because the Supreme Court of Wisconsin has sustained the validity of a state statute as against a claim of repugnance to Article VI, cl. 2 of the federal Constitution, the judgment below presents a question of federal law which may be reviewed by this Court upon writ of certiorari,[18] 28 U.S.C. § 1257(3). This Court gives "significant weight to the vital importance of preventing state injunctions from frustrating federal labor policy" such that interlocutory restraints in labor disputes are deemed "final" judgments and even normally adequate state grounds such as mootness present federal questions for purposes of review.[19] The federal question here, pressed from the beginning by petitioners, is of course determinative of the validity of the judgment below. If the preemption claim is correct, the "federal statute and policy oust state courts of any power whatever to deal with the conduct in question" and the judgment must be vacated.[20]

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[18] "The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art. 6 of the Constitution. Having found that the Wisconsin * * * Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand." *Amalgamated Assoc. of Street, etc. Employees v. Wisconsin Employment Relations Board*, 340 US 383, 399 (1951).

[19] *Liner v. Jafco*, 375 US 301, 304, 307-310 (1964); *Construction Laborers' Union v. Curry*, 371 US 542, 552 (1963).

[20] *Liner v. Jafco, supra*, 375 US at 309.

The question comes down to whether Congress, when it rejected specific proposals to outlaw the kind of peaceful economic weapon used here and limited the National Labor Relations Board from influencing the substantive terms upon which the parties contract by forbidding it, nevertheless left the state free to do so. Petitioners suggest that the decision below, in its broad arrogation to the states of exclusive power to forbid peaceful "strike tactics", and "partial strikes" in particular, threatens to obstruct the uniform application of national labor policy in the crucial area of the free play of federally permissible economic forces.

B. The Conflict.

The holding below that states have plenary power to police federally permissible peaceful partial strike activity conflicts directly with this Court's decision in *Morton*[21] and is contrary to the teachings of this Court in *Garner*[22] and *Insurance Agents*.[23]

Morton stands squarely for the principle that a state cannot outlaw a peaceful weapon of self-help which is permitted but not arguably protected by the federal statute.[24] There, the union

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[21] *Local 20, Teamsters Union v. Morton*, 377 US 252 (1964).

[22] *Garner v. Teamsters, etc. Local No. 776*, 346 US 485, 500 (1953).

[23] *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO*, 361 US 477 (1960).

[24] Professor Lesnick, as part of his thesis that the "time has long since come to eschew entirely the traditional 'primary jurisdiction' rationale implicit in the 'protected or prohibited' aphorism" in favor of a "negative inference" rationale consistent with petitioners' position here, observes: "[T]he notion that there is no preemption if unprotected conduct is also not prohibited is simply not the law. * * * *Morton* is squarely dispositive of the point. . . ." Lesnick, "Pre-

struck a trucking firm and, in a non-coercive manner, persuaded a customer to refrain from using the services of the struck firm, activity allowed by the federal statute but for which the lower court had awarded damages under state law. This Court, assuming the conduct to be neither arguably protected nor prohibited, 377 US at 258, nevertheless barred application of state law:

> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v. Labor Board, 366 US 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [§ 8(b)(4) of the Act], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." 377 US at 259-260

The *Morton* holding extends to self-help weapons generally this Court's postulate in *Garner* that the Act is a comprehensive code that outlaws some peaceful weapons in labor combat but permits others not specifically prohibited and implicitly bars their restraint under state law.[25]

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emption Reconsidered: The Apparent Reaffirmation of Garmon", 72 *Col. L. Rev.* 469, 472, 474 (1972). See, also, Ratner, "Damage Actions and the Impact of the Morton Case", *18th Ann. NYU Conf. on Labor*, 117, 122 (1966): "*Morton* is significant also in that it finally lays to rest the notion that conduct which the . . . Act neither prohibits nor protects is necessarily outside the occupied field and therefore subject to state law."

[25] "The detailed description of a procedure for restraint of specified types of picketing would seem to imply that other picketing is

The court below thought the *Garner-Morton* theory of countervailing economic power inapposite because Congress has not "taken in hand" or "focused upon" partial strike activity.[26] But the plain and necessary implications of *Insurance Agents* foreclose any such restriction. There the Labor Board claimed that refusals to work normal hours and other concerted on-the-job activities in aid of the union's position in negotiations violated § 8(b)(3) of the Act because such tactics obstructed the proper operation of the collective bargaining process by affording employees unfair economic advantage. This Court agreed, "arguendo", that the partial strike activities were not "protected" by § 7 of the Act, 361 US at 492, but reversing the Board on the point, held them permitted by the statute.

The premises underlying *Insurance Agents* necessarily oust state power. This Court reasoned that the availability of economic pressure devices is part and parcel of the process of collective bargaining established by the federal statute, and in-

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to be free of other methods and sources of restraint. For the policy of the [NLRA] is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 US at 499-500.

[26] *Morton* may have been an "easy case" because it involved secondary pressures, but, as Professor Cox states, its "underlying principle . . . is one of broad application" reaching *any* state-imposed "restrictions upon labor's use of economic weapons going beyond NLRA section 8(b) in terms of prohibited objects or forms of economic pressure." That underlying principle, according to Professor Cox, "explains more than the *Morton* case. It also supplies the ultimate foundation for the rule that state laws may not be used to restrict activities protected by Section 7." He propounds the principle as follows: "Congress struck a balance of protection, prohibition and laissez faire in respect to union organization, collective bargaining and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its own views concerning accommodation of the same interests." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1337, 1352, 1354 (1972).

deed, the very content of the bargain is likely to depend upon the sort of economic weapons the parties can use to gain acceptance of their bargaining demands. 361 US at 489. The federal agency lacked authority to "act at large in equalizing disparities of bargaining power" in the name of "some new distinction of justifiable and unjustifiable, proper and abusive economic weapons" or "to add to the Act's [specific] prohibitions here"[27] because "this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced." 361 US at 498.

It follows, *a fortiori*, that *state* courts and agencies must refrain from imposing their own standards as well.[28] For local prohibition of federally permissible economic weapons in collective bargaining presents:

> "the greatest threat against which the Garmon doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered."[29]

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[27] 361 US at 490, 495, 497, 498. More recently, this Court has again chided the Board for attempting to regulate "the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate", specifically indicating that the Act "neither protects nor prohibits" the weapon there, i.e. the fining of supervisor members for performing struck work. *Florida Power & Light Co. v. Int. Bro. of Electrical Workers*, 417 US 790, 41 L.ed. 2d 477, 488, n. 16 (1974). Absent review, the decision below would permit Wisconsin to disturb the free play of economic forces with respect to this weapon as well.

[28] "[I]t is strongly felt that concerted activity which serves to interfere with the employer's operations, without removing the participants from the employer's payroll is 'indefensible' . . . [H]owever, it seems a sufficient response that the employer is left free, as a matter of federal law, to discharge the culprits. No state intervention would appear to be called for. * * * From [*Insurance Agents*] it would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute." Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 668-669 (1961).

[29] *Hanna Mining Company v. District 2, Marine Engineers Ben. Assn., AFL-CIO*, 382 US 181, 193 (1965).

State policing of peaceful concerted activity is repugnant to a fundamental postulate of federal labor policy:

> "The perceived incapacity of . . . state legislatures, acting alone, to provide an informed and coherent basis . . . for equitably and delicately structuring the balance of power among competing forces so as to further the common good."[30]

State labor laws, like state anti-trust laws, may either fail to take account of federal labor goals, or, if they do, may represent a totally different balance than does federal labor policy.[31] Here, *Insurance Agents* precisely delineates the federal balance with respect to "unprotected" partial strike activity:

> "There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they are willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful . . ."
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> 361 US at 495.

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[30] *Amalgamated Assn. of Street, etc. Employees v. Lockridge*, 403 US 274, 286 (1971).

[31] *Connell Constr. Co. v. Plumbers Local 100*, — US —, 44 L.ed. 2d 418, 433-434 (1975). For example, § 111.06(2) (h) Wis. Stats. broadly prohibits any concerted interference with "production" except "leaving the premises in an orderly manner for the purpose of going on strike" because such conduct is deemed too "coercive" of employer interests. *Briggs-Stratton*, 336 US at 264-265. The federal statute is not so solicitous, actually protecting from employer reprisal much peaceful activity within the reach of the state statute (*infra*, p. 16) and leaving the rest to employer self-help, if he is willing to face the economic consequences of its use. Moreover, though today Wisconsin merely makes partial strike activity an unfair labor practice subject to restraint by the Commission or injunctive relief at its behest in state court (§ 111.07(4), Wis. Stats.), the decision below, if permitted to stand, would allow Alabama, or Wisconsin for that matter at some later date, to impose criminal penalties or to permit damage recoveries for such activities. Under *Lockridge*, however, the federal enforcement and remedial scheme, is as integral to federal labor policy as is the substantive law. 403 US at 287-288 and at 289, n. 5 (specifically condemning "disparities in the reactions of the states to unlawful union behavior").

One such "economic consequence" of employer self-help, by way of discipline at least,[32] could be the *protected* right of co-workers to strike for reinstatement of those disciplined.[33] Thus *Insurance Agents* teaches that the holding below disturbs the delicate balance struck by Congress by impinging on an area Congress left "to be controlled by the free play of economic forces."[34]

The claim below that conflict with *Garner* and *Morton* is averted because Congress did not "take in hand" or "focus upon" particular strike activity is untenable for another reason as well. In 1947, Congress did indeed "focus upon," and reject, a proposal to have the federal statute outlaw "concerted interference with an employer's operations conducted by remaining on the employer's premises" as an "unlawful concerted activity,"[35] a

[32] Another "self-help" response presumably available to K & T was to lock out until the impasse was resolved. If Wisconsin were to proscribe any employer self-help measure short of the lockout, as the reasoning below suggests it may do, then this Court would surely find the enactment to impinge on the area of labor combat designed to be free. *Pari passu*, the Union's conduct here must be privileged from state restraint.

[33] *John S. Swift Company, Inc.*, 124 NLRB 394, *enf'd on this point*, 277 F.2d 641 (7th Cir. 1960). In *Swift*, the employer discharged a number of employees who, in support of certain bargaining demands, had concertedly refused to work a mandatory assignment of overtime hours. Other employees then observed the picket lines established by the discharged workers and were, in turn, discharged. The Board held, and the Court of Appeals agreed, that the latter discharges were unlawful. "[E]mployees who go on strike to protest a lawful discharge enjoy statutory protection as economic strikers." 277 F.2d at 646.

[34] *NLRB v. Nash-Finch Co.*, 404 US 138, 144 (1971): "The federal regulatory scheme (1) protects some activities, though not violence [citation omitted]; (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces." This recent formulation of the applicable test suggests no room at all for state policing of peaceful strike tactics.

[35] H.R. 3020, 80th Cong., 1st Sess., § 12 reprinted at *1 Legislative History of the LMRA of 1947*, p. 205. Cf. *Insurance Agents*, 361 US at 499, n. 31.

proposal remarkably similar to the state statute applied here. The provision was dropped in the Conference Committee, *inter alia*, because employees who engage in such conduct "do not have any immunity under the act and are subject to discharge without right of reinstatement."[36] Thus, the legislative history itself demonstrates the fact of Congressional "focus" and unmistakeably suggests that the federal statute left such conduct as partial strikes to be controlled by the free play of economic forces.

C. The Importance of Reviewing the Conflict.

If the states are indeed "free to regulate [peaceful] strike tactics" and Congress left the "policing" of partial strikes "wholly to the states", as the court below so broadly holds, then each of the fifty state governments becomes, in substantial measure, the arbiter of allowable economic pressure within its boundaries and uniformity in crucial sectors of national labor policy is emasculated. If the decision below stands as law, Michigan's legislature, or its courts, for that matter, are free to outlaw concerted refusals by auto workers to work overtime when their employer attempts to "stock pile" production to prepare for a possible strike.[37] Alabama, Indiana, or Pennsylvania may do likewise for the steel industry, and so on. If the decision stands, a state may proscribe responsive worker pressures on the basis of parochial "evaluation of the very same range of interests that had to be considered in formulating national labor policy", a basis that this Court, early on, recognized as apt to threaten important federal concerns.[38]

[36] *1 Legislative History of the LMRA*, *supra*, p. 563.

[37] Auto workers in Wisconsin, of course, are vitally interested in the matter. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, appeared *amicus* in the Supreme Court of Wisconsin. App., p. A-5.

[38] See *Lockridge*, *supra*, 403 US at 290. "When a state is attempting to solve general problems, the danger of distributing various

Equally important, the arrogation of plenary authority to the states to "police" what the court below chose to term "partial strikes" portends local restraint of federally protected employee rights to engage in concerted activities for mutual aid and protection. Section 7 of the Act protects many forms of concerted on-the-job conduct including refusals to work overtime, all of which, at least literally, are partial strikes.[39] The court below ruled this federal precedent distinguishable, drawing a nice distinction between rejections of "scheduled or requested" voluntary overtime and refusals to "volunteer" for it and indicating that § 7 protects overtime bans by unorganized workers but not when they are union-induced in support of collective bargaining goals. That effort is not only misconceived,[40]

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interests in union organization and collective bargaining is much less serious than when it is formulating statutes or common law doctrines based upon evaluation of the very same range of interests that had to be considered in formulating national labor policy." Cox, "Federalism in the Law of Labor Relations," 67 *Harv. L. Rev.* 1297, 1321 (1954).

[39] Refusals to work voluntary overtime: *Dow Chemical Co.*, 152 NLRB 1150. Concerted rejection by production workers of optional though requested or scheduled truckdriving assignments: *Memphis Moldings, Inc.*, 164 NLRB 524. Non-unit workers' refusal to perform struck work: *Cooper Thermometer Co.*, 154 NLRB 502; *General Tire & Rubber Co.*, 190 NLRB No. 44, enf'd, 451 F.2d 257 (1st Cir. 1971). Refusal to cross picket lines at customer premises: *Redwing Carriers, Inc.*, 137 NLRB 1545, *enf'd*, 325 F.2d 1011 (DC Cir. 1963); *Overnight Transportation Co.*, 154 NLRB 1271, *enf'd*, 364 F.2d 682 (DC Cir. 1965); *Swain and Morris Constr. Co.*, 168 NLRB 1064.

[40] The Labor Board's rationale in *Dow Chemical* came down to the fact that, since overtime work was optional, "the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends * * * [and thus in concertedly rejecting the work the employees did not seek] to impose on their employer their own conditions of employment." 152 NLRB at 1152. Notwithstanding the Board's evident differentiation between insubordination and group exercise of a right to reject, the court below built a fortress on the procedural fortuity that *Dow* employees had refused to "volunteer" as opposed to exercising a right to decline requests to work the overtime. Further, the court's notion that otherwise protected concerted activity forfeits protection when union-induced is nothing less than the long discredited conspiracy doctrine. Since enactment of § 7 "[N]o longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy because they are undertaken by many persons acting in concert." *Briggs-Stratton*, 336 US at 258. Finally, the court below patently misread the Board's *Prince Lithograph* decision as authority for the proposition that union-induced concerted refusals to work voluntary, requested overtime are unprotected. The Board dismissed the complaint because Prince had exercised the normal privilege afforded any employer faced with *protected* full or partial strike activities, *i.e.*, to attempt to continue operating his business with replacements. *Prince Lithograph*, 205 NLRB No. 23 (Slip. op., p. 1, n. 2).

it also illustrates the magnitude of the threat to the exercise of protected rights when the wrong tribunals are free to make those determinations singlehandedly. This Court holds that, under federal labor policy, such "precise and closely limited demarcations" must be left to the Labor Board, the centralized agency "armed with its own procedures and equipped with its specialized knowledge and cumulative experience."[41] Thus the decision below rejects not only the legislative judgment in favor of uniformity of labor policy but the Congressional decision to confide primary interpretation and application of its rules to a centralized, expert tribunal. Of course, since the federal policies of substance and administration are intertwined, the decision below to breach the one inextricably led to breach of the other and makes review by this Court all the more important.

Finally, by materializing the *Briggs-Stratton* spectre that peaceful economic weapons may come within some excluded middle of federal labor policy neither arguably protected by §7 nor arguably prohibited by § 8 of the Act and thus be subject to state prohibition, the decision below makes it essential for this Court to reiterate, if not further articulate, the considerations to govern state tribunals confronted with challenges under local law to federally permissible economic pressure de-

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[41] *Garmon, supra*, 359 US at 242.

vices. For it is apparent that the question of state power cannot always turn on whether Congress arguably "protected" them under § 7.[42] Peaceful picketing to protest employment practices by persons other than employees of the picketed firm exemplifies recurring union conduct unprotected by § 7 and thus restrainable by the states under the rule of the decision below.[43] And, of course, no federally permitted *employer* self-help weapon, from post-impasse unilateral changes to the lock-out, is protected by § 7, even arguably. *Lockridge* teaches that state tribunals must be given a "rule capable of relatively easy application" so that they can "largely police themselves" in dealing with these crucial concerns. 403 US at 290. The decision below demonstrates the compelling need for further guidance from this Court since tribunals cannot "largely police themselves" and avoid encroachment upon federal labor policy with only concepts as indeterminate and subtle as Congressional "focus" to guide them through this unfamiliar territory.

II. Special and Important Reasons, Appropriately Presented in This Case, Warrant the Reconsideration and Overruling of Any Surviving Remnant of the Decision of This Court in Briggs-Stratton.

Considerations of sound judicial administration of federal labor policy warrant the review and reversal by this Court of any

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[42] Mr. Justice Harlan exposed the nerve of the difficulty in *Bro. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 US 369, 382, n. 17 (1969): "In the context of labor relations law this word ['protected'] is fraught with ambiguity. 'Protected conduct' may, for example, refer to employee conduct which the States may not prohibit, see, e.g. *Weber v. Anheuser-Busch, Inc.*, 348 US 468 (1955) or to conduct against which the employer may not retaliate, cf. e.g., *NLRB v. Truck Drivers*, 353 US 87, 96 (1957)."

[43] Even though this Court has, when presented with the issue, held non-employee picketing in fact protected from state restraint without explicitly discussing the point. *Int. Longshoremen's Assn. v. Ariadne Shipping Co.*, 397 US 195, 196-197 (1970); *NLRB v. Nash-Finch Co., supra.*

surviving remnant of its five to four holding in *Briggs-Stratton*. From what has been said in Point I above, it seems obvious that subsequent decisions of this Court have effectively drained that 1949 decision of its vitality. It has had no progeny in subsequent holdings here, and has not been cited in any preemption opinion of this Court for over ten years. Already, this Court has twice repudiated its "approach" as providing inadequate protection for federal concerns.[44] But state courts have divided as to whether its substantive holding remains viable;[45] and absent review, the decision below may well give it new life.

Leading scholars have observed that the substance of *Briggs-Stratton* was, in steady progression, undermined by *Garner*,[46] rejected in *Garmon*,[47] overruled inferentially by *Insurance*

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[44] See, e.g., *Garmon*, 359 US at 245, n. 4, and *Lockridge*, 403 US at 291. "For the reasons outlined above none of these approaches provided satisfactory . . . and each [including *Briggs & Stratton*] was ultimately abandoned. . . . [E]xperience . . . taught that each of these methods sacrificed important federal interests in a uniform law of labor relations . . . without yielding anything in return by way of predictability or ease of judicial application."; *Insurance Agents*, 361 US at 493, n. 23. "A now discarded approach to pre-emption;" "A decision rendered long ago".

[45] Compare *Holland Motor Express v. Michigan Employment Security Commission*, 42 Mich. App. 19, 201 NW 2d 308 (1972) and *Simpkins v. Painters Dist. Council 57*, 20 Idaho 1, 82 LRRM 2870 (1973).

[46] In 1958, Professor (now US Court of Appeals Judge) Paul R. Hays, wrote of *Briggs-Stratton*: "But under the logic of *Garner*, it, too, would be preempted, and I do not believe that any attempt to extend *Briggs-Stratton* beyond its exact facts would be successful. And this warning would apply even to conduct which has been held by the Board, much more clearly than had the conduct involved in *Briggs-Stratton*, to be unprotected, though not prohibited." Hays, "State Courts and Federal Preemption", 23 Mo. L. Rev. 373, 376.

[47] After *Garmon*, Professor Harry Wellington questioned whether *Briggs-Stratton* was "supportable" where the work stoppages were not "associat[ed] with potential violence . . . this weightiest of state interests" and said "the answer is no (and I assume that without this association intermittent work stoppages are still, as a matter of

Agents,[48] and felled in *Morton*.[49] Indeed, in *Insurance Agents*, the National Labor Relations Board advocated outright reversal of *Briggs-Stratton* and, in the opinion, this Court consistently referred to its "substantive" holding in *dubitante* terms.

> "We may agree *arguendo* . . . that this Court's decision in the *Briggs-Stratton* case . . . established that the employee conduct here was not a protected concerted activity. . . ."
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> * * * * * * *
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> "[*R*]*egardless of the status today* of other *substantive* rulings in the *Briggs-Stratton* case * * * [T]o view *Briggs-Stratton* as controlling on the § 8 issue would be to compound the defects of a *now discarded approach* to preemption; it would amount to saying that the Board [is] foreclosed . . . by a *decision rendered long ago* * * * *Perhaps* this element of the *Briggs-Stratton* decision [that '§ 13, unlike § 7, was not an inhibition on state power'] *has become open also*." 361 US 492, 493, n. 23 (emphasis added.)

Such considerations have prompted this Court to grant certiorari, particularly when the questioned precedent has not merely been reaffirmed but extended in the decision below.[50]

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federal law, outside the protection of Section 7." For one thing, he reasoned, to allow the state to "add its sanction to the employers could . . . upset the delicate bargaining balance established by federal law." For another, "no tribunal except the NLRB is to be trusted with expounding in the first instance the meaning of Section 7." Wellington, "Labor and the Federal System", 26 *U. of Chi. L. Rev.* 542, 550, 552.

[48] "[I]t would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute". Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 669.

[49] Ratner, "New Developments in Federal State Jurisdiction", *15th Ann. NYU Conf. on Labor* 47, 54-55; Cox, *supra*, 85 *Harv. L. Rev.* at 1348, 1352; Lesnick, *supra*, 72 *Col. L. Rev.* at 474.

[50] See, e.g., *Malloy v. Hogan*, 378 US 1 (1965); *Gideon v. Wainwright*, 372 US 335, 338 (1963) and *Republic Steel v. Maddox*, 379 US 650, 652 (1965).

Understandably, state courts are reluctant to anticipate action by this Court in overruling prior precedent, particularly when it affirmed a decision of the same court sustaining the state's statute. But this Court's essential role as the ultimate guardian of federal labor policy coupled with its institutional inability to proceed on a case-by-case basis in reversing state court pronouncements on the subject make it imperative that the labor preemption decisions of this Court represent a reasonably coherent synthesis so that state courts can largely police themselves. *Briggs-Stratton*, both in its substance and approach, represents a discordant, anachronistic and mischievous holding that it is now time for this Court to review and put entirely to rest; most importantly, because its substance conflicts with federal labor policy as pronounced in subsequent decisions of this Court, but also because, so long as its holding remains expressly unreversed, the decision below illustrates that state tribunals may be unwilling to repudiate its approach.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted

ROBERT E. GRATZ

GERRY M. MILLER
Attorneys for Petitioners

August, 1975

APPENDIX

APPENDIX A

Office of the Clerk
Supreme Court
State of Wisconsin

Robert O. Uehling
Clerk

Madison, May 6, 1975

To Michael, Best & Friedrich,
Milwaukee

Goldberg, Previant & Uelmen,
Milwaukee

Charles D. Hoornstra,
A.A.G.

Sir:—The Court today announced decision in your case as follows:

Lodge 76, International Association of Machinists, etc. v. WERC et al., No. 405.

Motion for Rehearing Denied Without Costs

No opinion filed.

Respectfully yours

ROBERT O. UEHLING
Clerk of Supreme Court

APPENDIX B

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and another, Appellants, v. WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Respondent: KEARNEY & TRECKER CORPORATION, Intervenor-Respondent.*

No. 405. Argued February 3, 1975.—Decided March 4, 1975.

APPEAL from a judgment of the circuit court for Milwaukee county: ROBERT W. LANDRY, Circuit Judge. *Affirmed.*

The judgment appealed from granted enforcement of an order of the Wisconsin Employment Relations Commission which directed the appellant Lodge to cease and desist from authorizing, encouraging or condoning any concerted refusal of the employees of Kearney & Trecker Corporation to accept overtime assignments.

Kearney & Trecker Corporation was a party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO. The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, and expired July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wanted to have a forty-hour week with a time and-a-half pay rate for work over eight hours in a day and forty hours in a week. The union wanted to retain the prior schedule of thirty-seven and

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* Motion for rehearing pending.

one-half hours a week with overtime rates applicable for work over seven and one-half hours a day and thirty-seven and one-half hours in a week.

On March 1, 1972, the employer announced that it was implementing its forty-hour week proposal effective March 12, 1972. On March 7th, the union membership authorized a strike and further resolved that no union member would work overtime, overtime being defined as work in excess of seven and one-half hours a day or thirty-seven and one-half hours a week. The employer and the union met on March 10th and 11th in unsuccessful attempts to resolve the issue. The employer did not implement its forty-hour week proposal on March 12th or at any time later.

On March 16, 1972, the union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the membership "will continue in effect until a labor agreement is signed."

Prior to March 7th only five percent of the employees declined overtime work. As many as 354 worked on Saturday, March 4th. After the union's March 7th meeting, however, all but three employees refused to work overtime. The employer suffered substantial damages as a result.

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act.

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union had violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S. Code, sec. 158 (b) (3) (NLRA) by its ban on overtime. On June 27, 1972, the NLRB regional director refused to

issue a complaint on the ground that the union's action was not prohibited by the NLRA. That refusal stated, in part:

> "Dismissal by this agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). After hearing, the examiner found that the union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the company's production and that the union had therefore violated sec. 111.06(2) (h), Stats. The examiner rejected the union's challenge to the commission jurisdiction, concluding that its refusal to work overtime was neither an activity arguably "protected" under sec. 7 of the NLRA nor an activity arguably "prohibited" under sec. 8 of the act. The commission adopted the examiner's findings and orders as its own.

The union petitioned the circuit court for Milwaukee county for review of the commission's order. The commission counter-petitioned for enforcement. The circuit court entered its judgment affirming and enforcing the commission's order. The union appeals.

For the appellants there were briefs by *Goldberg, Previant & Uelmen*, attorneys, and *Robert E. Gratz* and *Gerry M. Miller* of counsel, all of Milwaukee, and oral argument by *Mr. Miller* and *Mr. Gratz*.

For the respondent the cause was argued by *Charles D. Hoornstra*, assistant attorney general, with whom on the brief was *Robert W. Warren*, attorney general.

For the intervenor-respondent there was a brief by *Michael, Best & Friedrich*, attorneys, and *James C. Mallatt, Jacob L. Bernheim* and *John R. Sapp* of counsel, all of Milwaukee, and oral argument by *Mr. Sapp*.

A brief amicus curiae was filed by *Zubrensky, Padden, Graft & Bratt* of Milwaukee for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America.

HANLEY, J. The sole issue involved upon this appeal is whether the State of Wisconsin is precluded from enjoining a concerted refusal to work overtime which is in violation of sec. 111.06(2)(h) of the Wisconsin Statutes.

The union's conduct is not denied. They challenge the state's authority to enforce the statute, sec. 111.06(2)(h).

The union makes two arguments in support of its position that the state does not have the power to restrain peaceful concerted activities by unions. The first is that such activities are "permitted" by the NLRA and as such are not subject to state restraint. The second is that the state lacks the power to restrain such activities as are involved here because such conduct is arguably protected by the NLRA.

The respondents argue that conduct involved here was not permitted by the NLRA. They further argue that such conduct was not protected by the NLRA and that the permitted category is inapplicable in this case.

In *Automobile Workers v. Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 69 Sup. Ct. 516, 93 L. Ed. 651, rehearing denied 336 U.S. 970, 69 Sup. Ct. 935, 93 L. Ed. 1121 (hereinafter *Briggs and Stratton*), the United States Supreme Court reviewed a decision of this court which had upheld a board order requiring a labor union to cease and desist from instigating certain intermittent and unannounced work stoppages in an employer's plant. The supreme court

held that it could find no basis for denying this state the power to regulate a cause of conduct neither made a right under nor a violation of federal law. The court stated:

> ". . . While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states." 336 U.S. at 253.

The court went on to determine that the conduct of the union was not subject to regulations by the federal board and that the activity was not protected by sec. 7 of the NLRA.

Subsequent to that decision, the supreme court has considered this issue in a number of cases. In *Garner v. Teamsters Union* (1953), 346 U.S. 485, 74 Sup. Ct. 161, 98 L. Ed. 228, the court affirmed a Pennsylvania Supreme Court decision which held that a state court could not enjoin certain picketing by a union. The court stated:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . ." 346 U.S. at 490.

It was noted that the policy of the Labor Management Relations Act (LMRA) is not to condemn all picketing and that the detailed prescription of a procedure for restraint of specified types of picketing implies that other picketing is to be free of other methods and sources of restraint. ". . . For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S. at 500. It was recognized though, that the LMRA does leave much to the states.

Garner, the union says, holds that states cannot regulate peaceful economic weapons left free by federal law. However, *Garner* dealt with an area Congress had "taken in hand," namely, inducements to union membership. Therefore, Pennsylvania procedures and processes could not operate. In *Garner*, a national labor act purpose was frustrated by the state action. That is not the situation in the instant case.

In *San Diego Unions v. Garmon* (1959), 359 U. S. 236, 79 Sup. Ct. 773, 3 L. Ed. 2d 775, a California court had awarded damages for picketing which it concluded violated not only state law but also sec. 8 (b) (2) of NLRA. The United States Supreme Court reversed holding that:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. . . .
>
> ". . .
>
> ". . . When an activity is arguably subject to sec. 7 or sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National

> Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 244, 245.

We think *Garmon* amplified the protected-prohibited test set forth and declined to follow the "approach" of ***Briggs and Stratton*** under which the court itself determined the protected or prohibited nature of the activity.

That only the "approach" rather than substantive rulings of *Briggs and Stratton* was rejected is clear from the statement cited by appellants at page 14 of their brief.

> "The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." (359 U. S. at 245, fn. 4.)

The rules on pre-emption in the area of labor law were stated to be as follows in *Hanna Mining Co. v. Marine Engineers* (1965), 382 U. S. 181, 86 Sup. Ct. 327, 15 L. Ed. 2d 254:

> "The ground rules for pre-emption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by sec. 7, or prohibited by sec. 8' of the National Labor Relations Act, see 359 U. S., at 244-246; and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U. S., at 245. . . ." 382 U. S. , at 187, 188.

Despite these ground rules, the court reversed a decision of this court which had held that the state court lacked subject matter jurisdiction because the picketing involved arguably violated sec. 8 of the Federal Labor Act. The picketing was part of an effort by a union which had represented supervisors. The court held that because supervisory workers were involved the

activity was not arguably protected and also that it was not "in the respects immediately relevant prohibited by it."

It further held that Congress had not taken a policy of laissez faire toward supervisors which would oust state authority. 832 U. S. at 188, 189.

In *Motor Coach Employees v. Lockridge* (1971), 403 U. S. 274, 91 Sup. Ct. 1909, 29 L. Ed. 2d 473, rehearing denied, 404 U. S. 874, 92 Sup. Ct. 24, 30 L. Ed. 2d 120, the court reaffirmed the *Garmon* rules. The court once again pointed out that it could not declare that all local regulations involving the complex interrelationships between employers, employees and unions has been pre-empted and that ". . . much of this is left to the states." 403 U. S. at 289. The court reaffirmed the "arguably protected-arguably prohibited" test of *Garmon*, however, and held a state court did not have jurisdiction in an action by an employee against his union based on an alleged breach of conduct by the union in procuring the employee's discharge from employment because the conduct involved was arguably protected or prohibited by the NLRA.

This court has recognized these principles of pre-emption in the area of labor law. It was held in *Wisconsin Employment Relations Comm. v. Atlantic Richfield Co.* (1971), 52 Wis. 2d 126, 187 N. W. 2d 805, that the WERC was not prohibited from regulating collective bargaining in one-man bargaining units because the NLRB lacks jurisdiction in such cases and no national labor act purpose was frustrated by such state action.

The union here argues that their activity was arguably protected by the NLRA and, therefore, pre-emption exists. Initially, it had moved to dismiss the complaint before the WERC because the activity was arguably prohibited. The respondents take the position that it is neither.

In this case the only action on the national level was the NLRB's regional director's letter refusing to issue a complaint.

The regional director stated that "this action does not appear to be in violation of the act." The trial judge noted in his decision that the failure of the federal agency to take affirmative action does not confer power to act on the state. It is true that a letter from the regional director itself does not resolve the question with the clarity necessary to avoid pre-emption. However, in *Garmon* it was recognized that "compelling precedent" may provide that clear determination by the board.

The union does not contend here that the conduct is prohibited. The Supreme Court's decision in *Labor Board v. Insurance Agents* (1960), 361 U. S. 477, 80 Sup. Ct. 419, 4 L. Ed. 2d 454, makes it clear that activity of this nature is not prohibited. There the union members were engaged in harassing tactics including the refusal for a time to solicit new business, refusal to comply with company recording procedures, refusal to perform customary office duties and other activities. The NLRB held that such activities constituted a violation of sec. 8 (b) (3) of the NLRA, as amended, which makes the refusal to bargain collectively with an employer an unfair labor practice. The supreme court, in affirming a court of appeals decision setting aside the board's order, held that the board could not regulate "economic weapons" under the section requiring collective bargaining. Therefore, the activity involved here, the concerted refusal to work overtime, is not prohibited by the act. In refusing to issue a complaint in this case, the regional director relied on the *Insurance Agents Case*. The case merely holds that the NLRB had no power to regulate strike tactics and left regulation of strike tactics to the states. The case distinguishes between the power of the states to deal with strike tactics and the power of NLRB to deal with strike purposes. *Briggs and Stratton* is authority for this position.

The union does, however, argue that the conduct here is protected by sec. 7 of the NLRA. It relies heavily on the case of *Dow Chemical Co.* (1965), 152 NLRB 1150. That case in-

volved an employee who had engaged in activity connected with the refusal of employees to volunteer for weekend work. The NLRB held that such activity was protected concerted activity. It said:

> ". . . Here, however, Piatek's discharge was based in substantial part on her activity connected with the refusals to volunteer for work on March 7-8, and on March 7-8 the respondent's new work schedule was not yet in effect and therefore weekend work was still voluntary. In such circumstances, since the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends, we cannot say employees, by refusing to volunteer for work, lost the protection of the Act because they sought to impose on their employer their own conditions of employment. . . ." 152 NLRB at 1152.

The WERC seeks to distinguish *Dow* on two grounds. The first is that *Dow* involved the refusal to volunteer for overtime and in the case at bar the refusal was to work scheduled overtime. The second factor is that *Dow* involved no union inducement.

There may be a question as to whether *Dow* is in fact distinguishable. However, a more recent case appears to answer the question. In *Prince Lithograph Co., Inc.* (1973), 205 NLRB (No. 23, 1973), CCH, NLRB Dec. Par. 25,614, the NLRB affirmed the rulings, findings and conclusions of the administrative judge and adopted his recommended order. One of the issues involved was whether the termination and/or replacement of one employee violated the NLRA on the ground that it discouraged union membership. The employee had been discharged for refusing to work overtime as a part of a concerted refusal on the part of union members during contract negotiations and was at the direction of the local

union. Overtime was voluntary. The administrative law judge stated:

> "In the instant case the purpose of the strike was not . . . unlawful but I do not think that distinction controlling. If an overtime strike, protected by a voluntary right to refuse overtime, for an unlawful object constitutes a violation of the statute it would appear to be equally true that an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision." (Slip. Op. at p. 11.)

It was held that a concerted refusal to work scheduled or requested overtime is not protected, even if that overtime is voluntary. In *Prince* as in the case here, the union imposed a ban on overtime as a bargaining tactic.

We think that *Prince Lithograph Co., supra,* rather than *Dow, supra,* controls in this case. The activity here, under *Prince,* was unprotected activity. Therefore, the activity involved in this case is not arguably protected or arguably prohibited by the NLRA. It follows that pre-emption, under this test, is not involved in this case.

The union contends that even if the activity involved in this case is not arguably protected or arguably prohibited, it is "permitted" and the state cannot regulate it. It argues that peaceful concerted activity involved here is such as to be in an area to which there is a federal policy of laissez faire and this policy is part of the balance struck by regulation of these "permitted" activities.

The respondents both argue that the permitted rule only applies to areas where Congress has focused on similar conduct and not touched the particular conduct involved. They assert that this is not the case here and, therefore, if the application of the arguably protected or prohibited test does result in pre-emption, then the states are free to regulate in

this area. The WERC also takes the position that the "permitted" category only applies where the NLRB could act and does not apply to the strike tactic situation.

As has already been noted, the supreme court in *Briggs and Stratton* held that it could find no basis for denying this state the power to regulate a course of conduct neither made a right nor a violation of the federal law. The approach taken in that case has been changed, as has been discussed above, by *Garmon, supra.* The court has not, however, expressly overruled its decision in that case that a state can regulate such conduct.

Appellants rely heavily upon the decision of the United States Supreme Court in *Teamsters Union v. Morton* (1964), 377 U.S. 252, 83 Sup. Ct. 1253, 12 L. Ed. 2d 280, in challenging the application of the arguably prohibited or protected test. In *Morton* the action was brought pursuant to sec. 303 of the Labor Management Relations Act which authorized suit by any person injured as a result of a special secondary conduct prohibited by the act.

The Ohio Federal District Court found the union had violated sec. 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. The supreme court affirmed this finding of a "clear violation of sec. 303." 377 U.S. at 256.

The union in *Morton* had, however, engaged in another instance of secondary boycott activity, a direct approach by the union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was not in violation of sec. 303 since the union had approached the neutral employer directly rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law. The supreme court affirmed the dis-

trict court's award of damages under sec. 303, but it reversed the awards based on the Ohio law dealing with secondary boycotts.

The supreme court reversed the latter award even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and sec. 303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" 377 U.S. at 258.

The court concluded:

> "If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted sec. 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, . . ." 377 U.S. at 259, 260.

In *Morton* the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory treatment of secondary boycotts, Congress has not "focused upon" partial or "quickie" strikes. Policing of such conduct is left wholly to the states.

We agree with the WERC and the trial court that the doctrine of federal pre-emption does not require the WERC to refrain from relating the union's conduct in authorizing concerted refusal of employees to accept overtime assignments. Since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the federal labor act the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

APPENDIX C

State of Wisconsin
Circuit Court
Milwaukee County
Civil Division

Lodge 76 International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioners, v. Wisconsin Employment Relations Commission, Respondent.	No. 410-071

This action is a review of an order of the Wisconsin Employment relations Board affirming the order of an Examiner of the Commission pertaining to a labor dispute between Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and Kearney & Trecker Corporation. The order appealed from requires the Union to immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the complainant's Milwaukee area plants.

As a result of a complaint filed with the Wisconsin Employment Relations Board on June 15, 1972, an Examiner of the Commission conducted a hearing and determined that the Union was in violation of Section 111.06 (2) (b) and 111.06 (3), Wis. Stats., prohibiting a union from engaging in a concerted effort

to interfere with the employer's production by other means than by leaving the premises in an orderly manner for the purpose of going on strike. On April 23, 1973, the order was affirmed by the Commission, and on May 7, 1973, the Union petitioned for a review. The Commission counter petitioned for enforcement of its order on May 15, 1973, and the court allowed the employer to intervene on May 24th.

The parties agree that the sole issue presented is whether or not federal law preempted the power of the State of Wisconsin to prohibit interference with production by a concerted refusal to work overtime. The matter of overtime appears to be a major issue that will face unions and employers at the negotiating table in the immediate years ahead. The merits of the respective sides of that conflict are not now before the court. The more narrow issue confronting this case is whether the federal law prevents the Wisconsin Employment Relations Board from exercising its authority under the laws of the State of Wisconsin regarding this area.

The role of the court is defined by Section 227.20 (1), Wis. Stats., which provides that the court confines itself to the record and may affirm, reverse, or modify the decision (order) of the administrative agency. One of the grounds for review is that the decision was "in excess of statutory authority or jurisdiction of the agency or affected by other error of law."

In the case at bar the employer filed a complaint with the Wisconsin Employment Relations Board charging the Union with having engaged in a specific unfair labor practice within the meaning of Section 111.06 (2) (b), (h) and (3). The findings of fact contained in Paragraph 13 are undisputed that the Union engaged in a concerted effort to encourage its members to refuse to work overtime. The order requiring them to cease and desist from this activity is challenged on the ground it exceeds the authority of the Commission under the doctrine of preemption.

The doctrine of preemption is well established in labor law where the United States Supreme Court denied to the states the power to regulate labor disputes in those areas which Congress chose to exercise its authority by the enactment of the National Labor Relations Act and creating an agency to carry out its mandate. To effect the ends of the Act, to promote uniformity of regulation throughout the nation, and establish an expert body to interpret the Act and adopt implementing regulations, Congress declared, and the United States Supreme Court ruled, that the Board had exclusive jurisdiction in the area encompassed by the Act. The entire field of labor, however, is one in which there is overlapping or dual jurisdiction possessed by the federal and state government. The Wisconsin Employment Peace Act is a viable and active instrument in resolving labor disputes which lie outside the perimeters of federal legislation.

On June 27, 1972, the employer's application for a complaint filed with the National Labor Relations Board was dismissed by the Regional Director on the grounds that the conduct of the Union does not appear to be in violation of the Act. The letter dismissing the application stated, "Dismissal by this agency does not necessarily preclude the charging party from pursuing the rights under the statutes other than the National Labor Relations Act, or matters not covered by the Act." Dismissal of an application for a complaint by the National Labor Relations Board does not constitute a determination that the subject matter is not preempted. When the Company filed its complaint with the Wisconsin Employment Relations Board, the Union moved to dimiss the complaint on the grounds of federal preemption, but the Examiner denied the motion. On appeal the Commission affirmed that ruling. The same issue is now the exclusive matter in this appeal to the court.

Both parties agree that the ultimate forum for deciding the issue of the right of an employer to require an employe to work overtime is collective bargaining. Collective bargaining has

proved to be the enduring agency that allows for maximum potential development of both labor and industry. The enactment of the National Labor Relations Act and the Wisconsin Employment Peace Act were designed to make the collective bargaining affair proceed with a minimum of economic loss to management, labor, and the public.

Is the conduct of the Union the kind of activity that Congress intended should be untouched by either federal or state control as being an intrinsic part of the collective bargaining process? Nothing in the National Employment Relations Act expressly permits or expressly prohibits the Union from persuading its members to refuse overtime employment. The parties have been engaged in negotiations, and the issue of overtime as related to the conflict between employer and Union regarding the employer's effort to change the labor contract from a 37½-hour week to a 40-hour week.

Section 111.06 of the Wisconsin Employment Peace Act contains numerous provisions constituting unfair labor practices by the employer and the employe which may be enforced by submission of a complaint to the Commission. Federal law has preempted certain activities contained in Sections 7 and 8 of the National Labor Relations Act, but no case has been cited which declares that Subsection 2, (2) (h) of the Wisconsin Statutes relied upon by the Commission has become inoperative by reason of preemption.

The Union cites *National Labor Relations Board v. Insurance Agents International Union*, AFL-CIO, 361 U. S. 477 (1959) as authority for designating certain union activity as being outside the legally proscribed conduct even during negotiations. In that case the employes arrived late, neglected reports, left early, failed to cooperate in promotional schemes, but continued to sit at the bargaining table in a good faith effort to arrive at a contract.

The Supreme Court, in reversing the National Labor Relations Board, declared that the tactics used by the union do not support the finding that it failed to bargain in good faith. Section 8-B-3 of the Act does not prohibit the use of economic pressure. "Congress," said the court, "did not intend and has not authorized the Board to determine what economic sanctions might be permitted the negotiating parties in an ideal or a balanced state of collective bargaining."

To conclude from this language that the State is barred by the doctrine of preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. Before a provision of the Wisconsin Peace Act is declared a nullity, a more definitive basis must be relied upon. The tendency on the part of the Federal Government to participate more aggressively in the field of labor disputes may ultimately provide the stepping stones to extend federal authority either by legislation or court decision, but until then state activity is not denied by preemption on the basis of the Insurance Agents case.

In *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1958), the question of preemption again arose with respect to Sections 7 and 8.

> "We have necessarily been concerned with the potential conflict of two law enforcing authorities with the disharmonies inherent in two systems, one federal, the other state, of inconsistent standards of substantive law and differing remedial schemes, but the unifying consideration of our decisions has been in regard to the fact that Congress has entrusted administration of the labor policy for the nation to a centralized administrative agency armed with its own procedures and equipped with its specialized knowledge and cumulative experience."

The Union argues that Garmon is authority for the contention that where activity is clearly or arguably protected or prohibited by the Federal Act, state jurisdiction must yield. The key correlary to this principle enunciated by Justice Frankfurter is that where activity is neither prohibited or protected and, further, where the National Labor Relations Board fails to act, does not mean an automatic grant of authority and power to the states.

The guideline "where activity is clearly or arguably protected or prohibited" is used in other cases. The court's conclusion is that this activity is not arguably subject to the provisions of Section 7 or 8 of the Federal Act.

It is conceded by all parties that the record discloses that the Regional Director of the National Act dismissed the complaint of the Company on the ground that the complaint failed to set forth a violation of the Act. The failure on the part of the Federal Agency to take affirmative action does not confer power upon the state to act. The last bar to state jurisdiction is stated in the Frankfurter correlary. No standard, criteria, or clear principle has been set forth to invoke the Frankfurter correlary to this case. No persuasive reason has been announced to cause the court to conclude that the state law should be swept away on the basis of the cautionary dictum set forth in the Garmon case.

It is clear from the court's rulings that Sections 7 and 8 do not dominate the area of activity by a union engaged in the kind of activity at bar to sweep away state law. The Briggs & Stratton case, where the union engaged in concerted activity by holding frequent and irregularly scheduled meetings during working hours to the inconvenience of the production of the company, the authority of the Wisconsin Employment Relations Board to intervene with the application of state law was approved by the court. This case has never been overruled. *International Union UAW-AFL, Local 232 v. WERB*, 336 U. S. 245.

In order for the doctrine of preemptiion to take effect either the words of the National Labor Relations Act, the courts' decisions, or the declarations of the Board should manifest authority over the area concerned. No authority has been cited which satisfied the court that such an intention has ever been made in the area that was ruled upon by the Wisconsin Employment Relations Board in the instant case.

The petition to review, to overrule the Wisconsin Employment Relations Board, is denied. Its order is affirmed.

Counsel for the respondent is to prepare an order in conformity with this decision. A hearing will be held in Room 504 of the Courthouse before Branch 6 of the Circuit Court for Milwaukee County for consideration of further orders pertaining to this case, providing 72 hours' notice is given by the moving party.

Dated, Milwaukee, Wisconsin, August 24, 1973.

/s/ ROBERT W. LANDRY
Circuit Judge

APPENDIX D

State of Wisconsin

Before the Wisconsin Employment Relations Commission

Kearney & Trecker Corporation, Complainant, vs. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondents.	Case XI No. 15745 Cw-333 Decision No. 11083-C

Order Affirming Examiner's Findings of Fact, Conclusions of Law and Order

Examiner George R. Fleischli having, on February 26, 1973, issued his Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above entitled matter, and on March 13, 1973, the above named Respondents, by their Counsel, having timely filed a Petition for Review of said Examiner's decision; and on April 12, 1973, the Respondents, by their Counsel, having filed a brief in support of their Petition for Review; and the Commission having reviewed the record, the decision of the Examiner, the Petition for Review, and the brief filed in support thereof, being fully advised in the premises and being satisfied that the Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued by the Examiner should be affirmed;

Now, Therefore, it is

Ordered

That, pursuant to Section 111.07(5) of the Wisconsin Statutes, the Wisconsin Employment Relations Commission hereby adopts the Examiner's Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, issued in the above entitled matter as its Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, and, therefore, the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, shall notify the Wisconsin Employment Relations Commission within ten (10) days of the receipt of a copy of this Order as to what steps it has taken to comply therewith.[1]

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of April, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By MORRIS SLAVNEY /s/
MORRIS SLAVNEY, Chairman

ZEL S. RICE II /s/
ZEL S. RICE II, Commissioner

JOS. B. KERKMAN /s/
JOS. B. KERKMAN, Commissioner

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[1] In its Petition for Review the Respondent Lodge objected solely to the Conclusions of Law made by the Examiner, contending that the controversy was moot, and further that the activity involved in the matter was pre-empted by the National Labor Relations Board.

The same issues were raised in the proceeding before the Examiner. He dealt with such issues in his Memorandum, and we affirm his Findings of Fact, Conclusions of Law and Order, and we also adopt his well-reasoned rationale in his Memorandum with regard to the issues involved.

State of Wisconsin

Before the Wisconsin Employment Relations Commission

Kearney & Trecker Corporation, Complainant, vs. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondents.	Case XI No. 15745 Cw-333 Decision No. 11083-A

Appearances:

Peck, Bridgen, Petajan, Lindner, Honzik & Peck, S.C., Attorneys at Law, by *Mr. Egon W. Peck*, appearing on behalf of the Complainant.

Gratz, Schneidman and Myers, Attorneys at Law, by *Mr. Robert E. Gratz*, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint

having been held at Milwaukee, Wisconsin, on July 14, 1972 and August 3, 1972 before the Examiner, and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. That Kearney & Trecker Corporation, hereinafter referred to as the Complainant, is a corporation engaged in the manufacture of machine tools at several Milwaukee area plants and an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes; that Complainant is engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board referred to in Section 14(c)(1) of that Act, as amended.

2. That Lodge 76 of District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent Lodge is a labor organization having offices at 11000 Theodore Trecker Way and 8022 West Becher Street, Milwaukee, Wisconsin, and represents all hourly employes employed by the Compiainant at its Milwaukee area plants including leadmen, set-up men, and group leaders but excluding officers of the Corporation, department heads, foremen, assistant foremen, salaried office and salaried shop clerical employes, safety men, students, time study men and all other salaried professional and technical employes, guards and supervisors for purposes of collective bargaining on questions of wages, hours and working conditions; that the Respondent Lodge is affiliated with the Respondent District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO.

3. That District No. 10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent District is a labor organization with offices at 624 North 24th Street, Milwaukee, Wisconsin.

4. That on May 14, 1969, the Complainant and the Respondent Lodge entered into a collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the prior agreement, effective from 11:00 p.m. March 3, 1969 until 11:00 p.m. on February 28, 1971, and thereafter unless either party gave timely notice of its intent to terminate said agreement; that the Complainant gave the Respondent Lodge timely notice of its intent to terminate said agreement on June 19, 1971 and said agreement was terminated on that date; that representatives of the Complainant and Respondent Lodge met on numerous occasions beginning in October 1970 and continuing until on or about July 23, 1972 for the purpose of negotiating with regard to certain proposed modifications or changes in said agreement; that on August 9, 1972 the Complainant and the Respondent Lodge entered into a new collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the current agreement, effective from 11:00 p.m. on July 23, 1972 until 11:00 p.m. on July 22, 1973 and thereafter unless either party gives timely notice of its intent to terminate said agreement.

5. That in accordance with the terms of the prior agreement and in conformity with a practice extending over a number of years the basic work week for employes represented by the Respondent Lodge consisted of seven and one-half hours per day, Monday through Friday, for a total of thirty-seven and one-half hours per week and that all hours worked in excess of seven and one-half hours per day or thirty-seven and one-half hours per week were compensated at overtime rates; that at the outset of

the negotiations leading up to the current agreement the Complainant proposed *inter alia* that the basic work week for employes represented by the Respondent Lodge be changed to consist of eight hours per day, Monday through Friday, for a total of forty hours per week and that in the future all hours worked in excess of eight hours per day or forty hours per week would be compensated at overtime rates; that said proposed change in the basic work week, which was accompanied by an offer to increase the hourly rate of pay and improve certain fringe benefits, was deemed unacceptable by the representatives of the Respondent Lodge and the parties reached an impasse in their negotiations with regard to said proposal and certain other proposals; that on June 22, 1971 the Complainant advised the Respondent that even though an impasse had been reached in the negotiations and the prior agreement had been terminated it intended to continue to follow the provisions of the prior agreement "except as you may be notified otherwise by us in advance of any contemplated changes"; that the Complainant further advised the Respondent Lodge of its intent to make certain changes, not affecting the basic work week, effective with the beginning of the work week of June 28, 1971 and that said changes were thereafter made.

6. That the parties remained at an impasse in their negotiations with regard to the Complainant's proposal to change the basic work week and certain other proposals until March 1, 1972 on which date the Complainant notified the Respondent Lodge by letter of its intent to implement said proposal; that said letter, which was subsequently sent to all production and maintenance employes along with a letter of explanation on March 3, 1972, read as follows:

> "One of the items which was negotiated to an impasse was the Company's '40-hour work week proposal; concerning which our production and maintenance employees were advised in a communication we sent to them May 13, 1971.

In it we stated, with reference to the 40-hour work week proposal, that it is the Company's intention to put the 40-hour week into effect 'when the increase in production would otherwise make recalls necessary.'

As you know, we are now working overtime in many areas. Under these circumstances, we can no longer delay putting the 40-hour work week into effect. In the light of the above, we hereby notify you that effective with the work week beginning on March 13, 1972 (with the third shift starting at 11:00 p.m. on Sunday, March 12, 1972), the 40-hour work week proposal will become effective.

This decision will have the following effect:

(1) The wage rate of all employees will be increased by seven cents (7¢) per hour.

(2) The regular weekly work schedule will be 40 hours instead of the previous 37½ hours and the daily work schedule will be 8 hours instead of 7½ hours. (With a 24-minute unpaid lunch period instead of the previous 30-minute unpaid lunch period.)

(3) Time and one-half at the new higher rate will be paid for all hours worked in excess of 8 per day, instead of the previous 7½ hours per day, and for all time in excess of 40 hours per week instead of the previous 37½ hours per week.

(4) In order to make this effective within the terms of the terminated Labor Agreement of 1969, all references and computations based on the 7½ hour day and the 37½ hour week must be changed to 8 hours per day and 40 hours per week. Among the items so affected are these:

(a) Vacation benefits will be increased to 8 hours pay for each allowable day.

(b) Holidays occurring after the effective date of the 40-hour week will be paid at 8 hours pay at the employee's vacation hourly rate.

(c) Jury duty pay will be increased to 8 hours per day.

(d) Military active duty pay reimbursement will be at 40 hours per week less military pay.

(5) As stated above, instead of the 30-minute unpaid lunch period provided for in paragraph 60 of the terminated Labor Agreement, except for the third shift, will be 24 minutes. There will be no assigned lunch period for employees working on the third shift.

(6) In conformity with our proposal that the third shift premium would be increased to make the pay for the third shift employees equivalent to 40 hours, we are increasing the third shift premium from 8% to 18%.

(7) To conform to the new 40-hour work week the schedule of hours will be as follows:

Shift First	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday
Start		7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
End		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total					40.0 Hours	
Second						
Start		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
End		11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total					40.0 Hours	
Third						
Start	11:00 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
End	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
Hours	8.0	7.2	7.2	7.2	7.2	7.2
					36.8 Hours*	

*(Shift premium will make pay equivalent to 40 Hours.)

As stated in our letter to the Union dated June 22, 1971, 'The Company wants to have a Labor Agreement and will continue to negotiate to get one.' We also stated that we will otherwise continue to operate as we did previously, except for those changes which we listed and that 'if more of the changes which were proposed in the Company's letter of May 13 are to be instituted, you will be notified of them in advance.' This letter is in conformity with that promise."

7. That on or about March 3, 1972 representatives of the Respondent Lodge distributed a handbill at the plant gates which disputed certain assertions contained in the Complainant's letters of March 1, 1972 and March 3, 1972 and concluded as follows:

"ADVANCE NOTICE

A MASS MEETING IS BEING CALLED FOR TUESDAY, MARCH 7, 1:30 P.M.—SERB HALL—STRIKE SANCTION VOTE WILL BE TAKEN.

LODGE 76, IAMAW
Educational Committee"

8. That on or about March 6, 1972 representatives of the Respondent Lodge posted a notice, a copy of which was given to representatives of the Complainant which read as follows:

"LODGE 76 IAM

MASS
MEETING

MARCH 7

1:30 P.M.

SERB HALL
5101 W. Oklahoma Ave."

9. That the membership of the Respondent Lodge met at Serb Hall in Milwaukee, Wisconsin, at 1:30 p.m. on Tuesday, March 7, 1972, for the purpose of taking a strike sanction vote; that a strike sanction vote was taken at said meeting and that subsequently during said meeting two resolutions were presented to the membership and unanimously adopted which resolutions directed that no member of the Respondent Lodge should perform work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week and that no member of the Respondent Lodge should work overtime.

10. That on Friday, March 10, 1972, and Saturday, March 11, 1972 representatives of the Complainant met with representatives of the Respondent Lodge for the purpose of discussing the issues in bargaining including the work week; that during the course of the first meeting representaitves of the Complainant offered to defer implementation of its forty-hour work week proposal if the Respondent Lodge would agree "that daily overtime (in excess of 7½ hours a day) shall be part of the regular work schedulue" . . . and that "employees may refuse Saturday and/or Sunday overtime as in the past", and that the Respondent Lodge responded that the Complainants offer to defer the implementation of its forty-hour work week proposal "on the basis stated" was "completely unacceptable"; that during the course of the second meeting representatives of the Complainant offered to continue the existing thirty-seven and one-half hour work week "unless and until" an agreement was reached on the basic work week if the representatives of the Respondent Lodge would agree that employes could be required to work up to thirty minutes of overtime per day and that any Saturday or Sunday overtime could be refused "on the same basis as in the past" and that the representatives of the Respondent Lodge indicated that the Complainants' offer to continue the existing thirty-seven and one-half hour schedule until an agreement was reached on the basic work week was acceptable but that the other aspects of the Complainants proposal

were "not related" and "not acceptable" and indicated its intent to continue the "moratorium on overtime."

11. That the Complainant did not implement its forty-hour work week proposal on March 12, 1972 or at any time thereafter; that representatives of the Complainant met with representatives of the Respondent Lodge on March 13, 1972 and on several dates thereafter in an effort to resolve the dispute over the work week and the other issues in the negotiations; that during the course of said negotiations representatives of the Respondent Lodge consistently and frequently referred to the resolutions of March 7, 1972 as a "mandate" or a "mandate of the membership"; that at no time after March 11, 1972 and before July 14, 1972 did representatives of the Respondent Lodge agree to ask the membership to rescind the resolutions of March 7, 1972 even though they were asked to do so by representatives of the Complainant and that on or about March 16, 1972 representatives of the Respondent Lodge made the following statement, relevant herein, in a report distributed to its membership:

> "The Educational Committee wishes to remind you that even though the talks with the Company are continuing, the Policies voted on by the Production and Maintenance Employees WILL continue in effect until a Labor Agreement is signed."

12. That by custom and understanding none of the employes represented by the Respondent Lodge had been required to work daily or weekend overtime prior to March 7, 1972 but that the average refusal rate of overtime amounted to five percent of those employes offered overtime work; that prior to March 11, 1972 employes represented by the Respondent Lodge were performing a substantial amount of daily and Saturday overtime work and that as many as 354 employes performed overtime work on Saturday, March 4, 1972; that beginning on or about March 11, 1972 and continuing thereafter until on or about

July 23, 1972 none of the employes represented by the Respondent Lodge would accept daily or Saturday overtime work (with the exception of three employes who accepted overtime work on Saturday, May 13, 1972) even though the Complainant scheduled many of said employes for daily and Saturday overtime work on numerous occasions.

13. That the refusal by the employes represented by the Respondent Lodge to work overtime, beginning on or about March 11, 1972 and continuing thereafter until on or about July 23, 1972, was a concerted effort to interfere with the production of machine tools at the Complainant's Milwaukee area plants and that such refusal did in fact interfere with said production at the Complainant's Milwaukee area plants; that the Respondent Lodge authorized, encouraged and condoned said concerted refusal to work overtime; that the record does not establish that the Respondent District in any way authorized, encouraged or condoned said concerted refusal to work overtime.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

Conclusions of Law

1. That the Complainant's claim that the Respondent Lodge and the Respondent District have engaged in unfair labor practices in violation of Section 111.06(2)(h) and Section 111.06 (3) of the Wisconsin Statutes is based on existing facts and involves a real controversy over rights which may be presently asserted and is therefore not moot.

2. That the activity complained of, the concerted refusal to work overtime, is not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8 of the National Labor Relations Act, as amended, and that, therefore,

the Wisconsin Employment Relations Commission is not preempted from asserting its jurisdiction to regulate said conduct.

3. That the Respondent Lodge, by authorizing, encouraging and condoning the concerted refusal to work overtime beginning on or about March 11, 1972, and continuing thereafter until on or about July 23, 1972, has engaged in a concerted effort to interfere with production and has committed an unfair labor practice within the meaning of Section 111.06(2)(h) of the Wisconsin Statutes; that the Respondent District did not, in any way, authorize, encourage or condone said concerted refusal to work overtime and has not committed any unfair labor practices within the meaning of Section 111.06(2)(h) or Section 111.06(3) of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

Order

It Is Ordered that the Respondent Lodge, its officers and agents shall:

1. Immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the Complainant's Milwaukee area plants.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Send a copy of the letter marked "Exhibit A" and attached hereto to all employes of the Complainant, who are members of the Respondent Lodge. Said letter should be signed by the principal officer of the Respondent Lodge and directed to the employes' last known address.

(b) Immediately upon resumption of bargaining for a successor to the current collective bargaining agreement, post written notices in conformity with "Exhibit B", attached hereto, in its offices and in any places provided by the Complainant for the posting of notices. Said notices shall be signed by the principal officer of the Respondent Lodge and shall remain posted throughout said negotiations. Respondent Lodge shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

It Is Further Ordered that so much of the complaint that alleges that the Respondent District has engaged in conduct violative of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Statutes shall be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
By GEORGE R. FLEISCHLI /s/
GEORGE R. FLEISCHLI
Examiner

"EXHIBIT A"

To the membership:

Pursuant to an Order of the Wisconsin Employment Relations Commission all members of Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO are

hereby notified that the action taken by the membership, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that hereafter Lodge 76 will not in any way authorize, encourage or condone such conduct on the part of its membership.

.....
(Principal Officer)

"EXHIBIT B"

Notice

Pursuant to an Order of the Wisconsin Employment Relations Commission all employes of Kearney & Trecker Corporation represented by Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, are hereby notified that the action taken by the membership of said organization, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that all members of said organization are hereby asked to refrain from engaging in any concerted refusal to accept assignments of overtime work throughout the negotiations currently in progress with Kearney & Trecker Corporation.

.....
(Principal Officer)

KEARNEY & TRECKER CORPORATION, XI, Decision No. 11083-A

Memorandum Accompanying Findings of Fact, Conclusions of Law and Order

Pleadings

In its complaint which was filed on June 15, 1972, the Complainant alleged that the Respondent called a meeting of its membership on March 7, 1972 at which a resolution was adopted which directed the membership to refuse to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week[1] and that although a substantial amount of work in excess of seven and one-half hours per day and in excess of thirty-seven and one-half hours per week has been scheduled for said employes since March 7, 1972 said employes have engaged in a concerted refusal to work the additional hours as scheduled. The Complainant further alleged that the purpose and effect of said resolution and concerted action was to interfere with the production of the Complainant and that said action was therefore in violation of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Employment Peace Act which provide:

"111.06

(2) It shall be an unfair labor practice for an employe individually or in concert with others:

* * * * * * *

(h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere

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[1] The evidence presented at the hearing establishes that two similar resolutions were passed. However, the effect of both resolutions was the same. See Finding of Fact numbered 9 and discussion, *infra*, under "Violation Found".

with production except by leaving the premises in an orderly manner for the purpose of going on strike.

* * * * * * *

(3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

In its prayer for relief the Complainant asks that the Respondents be ordered to cease and desist from the action complained of and that they be affirmatively ordered to perform whatever acts are necessary and appropriate to insure that the employes are advised that the action complained of is illegal and that, in the future, employes should perform their obligations as employes without regard to the action taken on March 7, 1972. Hearing on the complaint was set for July 14, 1972.

On June 23, 1972 the Respondents filed a written motion to dismiss the complaint and in their motion requested that the hearing scheduled in the matter be limited to the evidence relevant to any factual issues raised by their motion. That motion alleged: (1) That the Wisconsin Employment Relations Commission lacked jurisdiction over the subject matter of the complaint in that the activity complained of was "arguably prohibited" by the National Labor Relations Act as amended and (2) that the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint in that the provisions of the Wisconsin Employment Peace Act alleged to have been violated are unconstitutional to the extent that they are in conflict with the National Labor Relations Act as amended. The Complainant objected to the Respondents' request that the hearing be limited to any factual issues raised by the Respondents' motion since there were no factual issues

raised by the Respondents' motion and alleged that the Complainant was suffering severe economic harm as a result of the action complained of. At the Examiner's request the Respondents filed their answer so as to more clearly delineate the issues of fact raised by the pleadings.

In their answer, which was filed on June 30, 1970, the Respondents admitted that a resolution was adopted at the meeting on March 7, 1972 wherein the employes agreed not to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week but denied knowledge concerning the amount of overtime scheduled subsequent to said resolution and denied the other allegations of the complaint. The answer affirmatively alleged that the Complainant was engaged in an industry affecting commerce; that the activity complained of was the subject of an unfair labor practice charge pending before the National Labor Relations Board wherein the Complainant herein alleged that said activity constitutes an unfair labor practice under Section 8 of the National Labor Relations Act, as amended; and that the complaint ought to be dismissed since it was arguably prohibited by that Act and therefore the Wisconsin Employment Relations Commission was preempted from asserting jurisdiction.

In order to expedite the handling of the case and at the same time accommodate the Respondents' request for a delay because certain witnesses were unavailable on the hearing date set, the hearing was opened as scheduled on July 14, 1972 for the purpose of allowing the Respondents to present any evidence they desired in support of their motion and to permit the Complainant to present its evidence and arguments on the merits. At the outset of the hearing, the Respondents orally renewed their motion to dismiss and the parties stipulated to the relevant jurisdictional facts. It was agreed at the conclusion of the Complainant's case that the hearing would adjourn and be reconvened if necessary at a later date at which time the Respondents would be afforded

an opportunity to present any evidence they desired to offer on the merits. The hearing was reconvened on August 3, 1972 at which time the Respondents declined the opportunity to present evidence but renewed their motion to dismiss on the additional ground that the controversy was now moot in that, after the first day of hearing and before the second day of hearing, the parties had agreed upon the terms of a new collective bargaining agreement. The parties stipulated that such agreement had been reached but the Complainant denies that the controversy is moot as a result of that agreement.

The Facts

There is no dispute over the facts relating to the question of jurisdiction. At the hearing the parties stipulated that the Complainant is engaged in an industry affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board. With regard to the allegation in the Respondents' answer that the subject matter in dispute is currently pending before the National Labor Relations Board, the evidence adduced at the hearing indicates that so much of the charges filed with the National Labor Relations Board[2] which alleged that the activity complained of herein constitutes a violation of the National Labor Relations Act, as amended, has been dismissed and that dismissal has not been appealed. In dismissing the charges pending before the National Labor Relations Board the Regional Director said in relevant part:

> "The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> * * * * * * *

[2] Case No. 30-CB-527.

> As to the adoption by the Union on March 7, 1972 of a policy prohibiting overtime work by its member employees, this action does not appear to be in violation of the Act. *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477. Dismissal by this Agency does not necessarily preclude the Charging Party from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act. I am therefore refusing to issue complaint at this time.
>
> * * * * * * *"

The Complainant introduced substantial evidence supporting its allegations that the employes represented by the Respondent Lodge engaged in a concerted refusal to work overtime hours in excess of seven and one-half hours per day or thirty-seven and one-half hours per week; that said concerted refusal was in compliance with the resolutions presented and adopted by the membership of the Respondent Lodge at its meeting on March 7, 1972; and that said concerted refusal imposed severe economic hardship on the Complainant in its efforts to deal with temporary "pulse" varieties of production thereby endangering its relationship with its customers through an inability to meet production deadlines and the incurring of financial penalties contained in their contracts with the government. The Respondents introduced no evidence contradicting the Complainant's evidence regarding the impact of the concerted refusal; however, the Respondents brought out, through cross-examination of the Complainant's witnesses, the fact that certain forms of economic pressure were brought to bear on the Respondent Lodge by the Complainant through the cancellation of a lease held by the Respondent Lodge on office space in one of the Complainant's plants and the unilateral implementation of certain proposals in bargaining, including a proposal to eliminate the practice of compensating representatives of the Respondent Lodge for conducting certain representation activities during working hours.

Positions of the Respondents:

The Respondents argue that, in their view, there are two legal issues to be resolved at this juncture: (1) Should the complaint be dismissed by the Wisconsin Employment Relations Commission on the claim that the controversy is now moot?; and (2) When an activity is neither protected nor prohibited under the federal act, may a state regulate any or all such activities? The Respondents do not deny that the activity complained of constituted an interference with production but argue that the controversy is now moot and that therefore the Commission ought to dismiss the complaint. However, if the Commission does not dismiss the complaint as moot the Respondents ask that it be dismissed for lack of jurisdiction citing a number of United States Supreme Court decisions dealing with the Constitutional doctrine of preemption.

Position of the Complainant:

The Complainant contends that the controversy in question is not moot within the meaning of the case of *WERB v. Allis-Chalmers Workers Union, Local 248, UAWA-CIO*[3] and that unless a cease and desist order is issued there is reason to believe that the same tactic may be employed during the negotiations for a successor to the current collective bargaining agreement. The Complainant argues that the activity complained of is clearly a prohibited interference with production under the rationale of the *Stolper*[4] case and that there is no issue of preemption in this case in that the *Briggs-Stratton*[5] case held that state regulation of the conduct complained of is not preempted

[3] 252 Wis. 436, 21 LRRM 2699 (1948).

[4] *Stolper Steel Products Corp.* (2109) 5/49, aff'd. 258 Wis. 481, 27 LRRM 2418 (1951).

[5] *International Union, UAW v. WERB*, 336 U.S. 245, 23 LRRM 2361 (1949).

by the National Labor Relations Act, as amended. The Complainant relies upon a number of the same cases relied upon by the Respondents in support of its position with regard to the question of preemption.

Mootness

It is clear that the matter in controversy is not moot. The Wisconsin Supreme Court has defined a moot case as

> ". . . one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy."[6]

If the Complainant is correct in its view of the law, the activity in question violates the public policy of Wisconsin as expressed in the Wisconsin Employment Peace Act and it has a legal right to ask that the Respondents be directed to cease engaging in that activity and take such affirmative action as might be appropriate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not seeking a "decision in advance" since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".

Even though the activity complained of has ceased, the terms of the current collective bargaining agreement will be subject to

[6] *WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO*, 252 Wis. 436, 21 LRRM 2699 at p. 2701 (1948).

renegotiation beginning in March 1973, and the agreement can be terminated by either party as early as July 22, 1973. If the Commission were to dismiss the case as moot at this point in time, the Respondents could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in the Wisconsin Employment Peace Act and would have the "practical legal effect" of leaving the Complainant with an effective remedy.

The Wisconsin Supreme Court has specifically recognized that a case that might be said to be moot by reason of the fact that the unfair labor practice complained of has ceased is not moot if it can be said that interests of a public character are asserted under conditions that may be immediately repeated.[7] This case clearly falls within the rule of that case and the Commission ought to assert its jurisdiction to make a determination in the matter

Preemption

In the *Briggs-Stratton*[8] case the United States Supreme Court held, in a divided opinion, that Wisconsin was not preempted from prohibiting a union from engaging in "quickie" strikes in violation of Section 111.06(2)(h) even though the conduct involved was concerted and arose on the context of a labor dispute with an employer engaged in interstate commerce, since the conduct involved was "not regulated" by the federal law. The majority opinion held that it was within Wisconsin's police power to prohibit such activities and that nothing in the National Labor Relations Act or the Labor-Management Relations Act "forbid"

[7] *Ibid.* at p. 441.

[8] *Supra,* footnote 5.

or "legalized" the conduct in question which was either "governable by the states * * * or entirely ungovernable". The two dissenting opinions in that case focused on the claim that the "quickie" strikes were a form of protected concerted activity and therefore unlike the situation presented in the *Allen Bradley*[9] and the *Fansteel*[10] cases which involved criminal violations and plant seizure.

The *Briggs-Stratton* case was one of the earliest cases involving the question of preemption and the Respondents argue that the *Briggs-Stratton* case must be read in the light of the many decisions rendered subsequent to that decision particularly the *Garmon* decision.[11] In the *Garmon* case the Supreme Court reviewed the numerous prior decisions dealing with the impact of the federal scheme of labor legislation on the state's authority to regulate employer and union conduct. In an effort to distill the collective wisdom of those prior cases the Supreme Court set out the following test for preemption:

> "When it is clear or may fairly be assumed that the activities which the State purports to regulate are protected by Section 7 of the Taft-Hartley Act or constitute an unfair labor practice under Section 8 due regard for the federal enactment requires that state jurisdiction must yield."[12]

[9] *Allen Bradley Local v. WERB,* 315 U.S. 740, 10 LRRM 520 (1942).

[10] *NLRB v. Fansteel Metallurgic Corp.,* 306 U.S. 240, 4 LRRM 515 (1939).

[11] *San Diego Building Trades v. Garmon,* 359 U.S. 236, 43 LRRM 2838 (1959).

[12] *Ibid.* at p. 2841. At least two exceptions were specifically recognized to the general rule:

(1) Where the activity regulated is of "peripheral concern" such as was the case in *International Association of Machinists v. Gonzales,* 356 U.S. 617, 42 LRRM 2135 (1958); and

(2) Where the regulated conduct dealt with interests so deeply rooted in local feeling and responsibility that, in the ab-

The Court further held that where it is not clear whether the particular activity regulated by the states is either protected under Section 7 or prohibited under Section 8, the primary authority to adjudicate the question is the National Labor Relations Board and that in the absence of a clear determination by the National Labor Relations Board, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. Specifically repudiating the *approach* taken to the preemption question in the *Briggs-Stratton* case the Court said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Section 7 or prohibited by Section 8 then the matter is at an end, and the states are ousted from all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for [the courts] to decide whether such activities are subject to state jurisdiction . . ."[13]

The fact that the Supreme Court repudiated the *approach* taken in deciding the preemption question raised in the *Briggs-Stratton* case is not the equivalent of a reversal of the result of that case and the power of Wisconsin to prohibit "quickie" strikes would appear to remain intact since it is neither a protected nor prohibited activity under the *Garmon* test.

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sence of compelling Congressional direction, the Court was reluctant to find that Congress had deprived the states of the power to act such as was true in *United Automobile Workers v. Russell*, 356 U.S. 634, 42 LRRM 2142 (1958); *United Construction Workers v. Laburnum*, 347 U.S. 656, 34 LRRM 2229 (1954); *Youngdahl v. Rainfair*, 355 U.S. 131, 41 LRRM 2169 (1957) and *Auto Workers v. WERB*, 351 U.S. 266, 38 LRRM 2165 (1956).

[13] *Ibid.* at p. 2842.

The Supreme Court recently reviewed the *Garmon* test and affirmed its continued vitality and reiterated the unacceptability of the approach taken in the *Briggs-Stratton* case in deciding the question of preemption.[14] It appears then that the question that must be answered in this case is whether the state of Wisconsin is precluded from regulating the conduct in a question when the *Garmon* test is applied to the facts in this case in the manner required.

In this case the Complainant did file charges with the National Labor Relations Board which charges were dismissed as indicated above. Because those charges were dismissed without a decision by the Board itself it could be argued that there has not been a "clear determination" by the Board in this case. Therefore it could be argued that, in the absence of "compelling precedent applied to essentially undisputed facts", the Wisconsin Employment Relations Commission is without power to act in this case.

The Examiner is satisfied that the Board decision combined with the Supreme Court decision in the *Insurance Agents*[15]

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[14] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 77 LRRM 2051 (1971). The Court made a further delineation of the exceptions to the *Garmon* test and added the following examples:

(1) Where the concurrent jurisdiction of the state courts is allowed to help enforce the duty of fair representation as set out in *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1957); and

(2) Where Congress had indicated an intent to allow concurrent jurisdiction such as is the case in court actions under Section 301 of the Labor-Management Relations Act.

Neither these exceptions nor the two referred to in *Garmon* and set out above in footnote 12 would appear to apply to the instant proceeding. If Wisconsin has jurisdiction in this case it is because the *Garmon* test has been met and not because this case constitutes an exception to that test.

[15] *NLRB v. Insurance Agents International Union*, 119 NLRB 768, 41 LRRM 1176, rev'd. 260 F. 2d 736, 43 LRRM 2003 aff'd. 361 U.S. 477, 45 LRRM 2704 (1960). Although the Regional Director's refusal to issue a complaint on the charges filed by the Complainant before the National Labor Relations Board is not the

case amounts to a holding that a concerted refusal to work overtime is neither a protected activity under Section 7 nor a prohibited activity under Section 8 of the Labor-Management Relations Act and that that case constitutes a compelling precedent. It may also be said that the facts are essentially undisputed in this case since the Respondents do not deny that there was a concerted refusal to work overtime.[16]

It has been persuasively argued by Archibald Cox, an acknowledged authority in the field of labor law, that the *Garmon* test is inadequate in that it tends to allow the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme.[17] In this case the Respondents' power to engage in a concerted refusal to work overtime is an economic weapon unregulated by the federal law just as an employer's power to discipline employes for engaging in such activities is unregulated by the federal law. It cannot be denied that to the extent that the states are free to limit or prohibit the use of a particular economic weapon, state laws may have an impact on the relative balance of power in a given bargaining relationship. However the Examiner feels compelled to find in this case that the state of Wisconsin is not, under the *Garmon* test, preempted from effectuating its public policy which *inter alia* prohibits the use of the particular economic weapon employed in this case, that is interfering with production through a concerted refusal to work overtime.

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equivalent of a "clear determination" that the activity is neither protected nor prohibited it is important to note that the National Labor Relations Board relied on the *Insurance Agents* case in finding no prohibited activity and dismissing the charges.

[16] This is not a case where there is a serious question of fact as to whether the activity in question is an unannounced strike. Cf. *1st National Bank of Omaha v. NLRB*, 413 F. 2d 921, 71 LRRM 3019 (1969).

[17] Cox, *Labor Law Preemption Revisited*, 85 Harvard Law Review 1337 (1972).

Violation Found

The Examiner has been unable to find any prior Commission case specifically involving an effort to interfere with production through a concerted refusal to work overtime. However, the language of Section 111.06(2)(h) is quite broad and would appear to encompass any form of concerted action to interfere with production other than through the use of the traditional strike weapon. In the *Stolper*[18] case theCommission held that a concerted refusal to work at a rate in excess of 100% of the established, acceptable production standard was an unlawful interference under Section 111.06(2)(h) even though the employes were free individually to so limit their production. In a series of *Dry Cleaning Cases*,[19] the Commission held that enforcement of union bylaws prohibiting production in excess of union-established production standards constituted an unlawful interference with production.

It can hardly be argued that the activity involved herein is a form of protected concerted activity under Section 111.04 of the Wisconsin Peace Act in view of the similarity between that section and Section 7 of the National Labor Relations Act and the specific prohibition contained in Section 111.06(2)(h) of the Wisconsin Employment Peace Act. The fact that employes are free to engage in the conduct in question individually would not seem to affect the result. The employes in the *Stolper* case were individually free to limit their production to 100% of standard for whatever personal reasons they might have or for no reason. But when the employes in that case engaged in a *concerted* refusal to produce in excess of the established, acceptable standard in an effort to interfere with production they

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[18] *Supra*, note 4.

[19] *Ace Cleaners* (2723), 2/51; *American Dry Cleaners, et al.* (2724), 2/51; *Artistic Dye Works, et al.* (2732), 2/51; and *Bell View Dye Works* (2734), 2/51.

engaged in an unlawful activity. Section 111.06(2)(h) makes no distinction between concerted activities which are otherwise permissible and those which are otherwise impermissible but prohibits *all* concerted activities which attempt to interfere with production other than the strike.[20]

The evidence of record is clear that the refusal rate of overtime offer increased from 5% to nearly 100% immediately after the Respondent Lodge passed the two resolutions which in effect said that no member of the Respondent Lodge would accept an overtime assignment. (Because the Complainant never implemented its proposed change in the work week, the two resolutions had the same practical effect). The inference that the increase in the refusal rate was the direct result of the two resolutions is inescapable because of the timing, the frequent reference to the resolutions by the representatives of the Respondent Lodge and the total absence of any evidence that would support a different conclusion.

On the other hand there is no indication that the Respondent District in any way authorized, encouraged or condoned the action of the Respondent Lodge. Although a Business Representative employed by the Respondent District was frequently present during the negotiations there is no showing in the record that he authorized or encouraged the Respondent Lodge in the activity in question. Although it could be argued that the Business Representative personally condoned the activity by his failure to repudiate the tactic, there is no showing in the record that he was acting as a representative of the Respondent District at the time. The labor dispute was between the Complainant and the Respondent Lodge and the only inference supported by the rec-

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[20] Of course, to the extent that Section 111.06(20(h)) might prohibit activities which are arguably protected activities under Section 7 of the National Labor Relations Act as amended, the Wisconsin Employment Relations Commission is preempted from enforcing said provision.

ord would be to conclude that he was acting as a representative of the Respondent Lodge at the time.

For the above and foregoing reasons the Examiner has found that the Respondent Lodge has acted in violation of Section 111.06(2)(h) of the Wisconsin Statutes and entered an order directing the Respondent Lodge to cease and desist the practice and take appropriate remedial action to insure its non-recurrence and dismissing so much of the complaint that aleges that the Respondent District has acted in violation of Section 111.06 (2)(h) or Section 111.06(3) of the Wisconsin Statutes.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

Wisconsin Employment Relations Commission
By George R. Fleischli /s/
George R. Fleischli, Examiner

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.)

Section 2. "When used in this subchapter

* * * * * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

* * * * * * * *

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a).

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 10.

"(a) The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by * * * law."

* * * * * * * *

Section 13.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 501.

"When used in this act—

* * * * * * * *

(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

Wisconsin Statutes

Sec. 111.06.

(2) "It shall be an unfair labor practice for an employee individually or in concert with others:

* * * * * * * *

(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

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Supreme Court, U. S.
FILED
DEC 15 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED AUGUST 2, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

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RELEVANT DOCKET ENTRIES

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1972	
June 12	Complaint against Unions filed by Kearney & Trecker Corporation with Wisconsin Employment Relations Commission.
June 23	Motion to dismiss filed by Unions with Wisconsin Employment Relations Commission.
June 30	Answer filed by Unions.
July 14	Hearing held before Wisconsin Employment Relations Commission Examiner George Fleischli.
Aug. 3	Further hearing held before Wisconsin Employment Relations Commission Examiner.
1973	
Feb. 26	Wisconsin Employment Relations Commission Examiner issued Findings of Fact, Conclusion of Law, Order, and Supporting Memorandum.
Mar. 13	Unions filed with Wisconsin Employment Commission a petition for review of Examiner's Decision.
Apr. 23	Wisconsin Employment Relations Commission issued order affirming examiner's findings of fact, conclusions of law, and order.
May 7	Unions filed petition for review of Wisconsin Employment Relations Commission order with Circuit Court for Milwaukee County.

May 15 Wisconsin Employment Relations Commission filed counter-petition for enforcement of its order with Circuit Court for Milwaukee County.

May 24 Circuit Court for Milwaukee County granted Kearney & Trecker Corporation's petition to intervene in said proceedings.

Aug. 24 Milwaukee County Circuit Judge Robert W. Landry issued opinion affirming WERC order and denying Unions' petition to overrule same.

Aug. 29 Circuit Court for Milwaukee County entered judgment in accordance with opinion dated August 24, 1973.

Oct. 31 Unions filed notice to appeal to the Supreme Court of Wisconsin and undertaking.

1975

Mar. 4 Supreme Court of Wisconsin entered decision affirming judgment of Circuit Court for Milwaukee County.

May 6 Supreme Court of Wisconsin entered order denying Unions' motion for rehearing.

Aug. 2 Unions' petition for writ of certiorari to the Supreme Court of Wisconsin filed in Supreme Court of United States.

Oct. 14 Supreme Court of United States granted Unions' petition for writ of certiorari.

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

Kearney & Trecker Corporation, Complainant, vs. Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, Respondents.	Case XI, No. 15,745, Cw-333.

COMPLAINT

(Filed June 15, 1972)

Complainant, by its attorneys, Peck, Brigden, Petajan, Lindner, Honzik & Peck, s.c., alleges as follows:

1. That the Complainant, Kearney & Trecker Corporation, is a corporation with a manufacturing plant and its principal offices located at 11000 Theodore Trecker Way, Milwaukee, Wisconsin 53214.

2. That the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization with offices at 11000 Theodore Trecker Way,

Milwaukee, Wisconsin 53214 and at 8022 West Becher Street, Milwaukee, Wisconsin 53227.

3. That the Respondent, District 10, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization with offices at 624 North 24th Street, Milwaukee, Wisconsin 53233.

4. That at all times material herein, the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, was the duly recognized collective bargaining representative for its production and maintenance employees in the manufacturing plants operated by the Complainant in Milwaukee County, Wisconsin, and said Respondent has been and still is affiliated with the Respondent, District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO.

5. That on March 7, 1972, the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, convened a meeting of its membership consisting of production and maintenance employees employed by the Complainant and represented by it in its said manufacturing plants, and at said meeting adopted a resolution which prohibited the said employees of the Complainant in the production and maintenance unit represented by Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, to work in excess of 7½ hours per day or 37½ hours per week.

6. That prior and up to March 7, 1972, a substantial amount of hours of work in excess of 7½ hours per day and in excess of 37½ hours per week had been scheduled for a majority of the employees in the bargaining unit represented by said Lodge 76, International Association of Machinists and Aerospace workers, AFL-CIO, and with very few exceptions the hours as

scheduled by Complainant were worked by the employees involved.

7. That the performance of the work for the hours so scheduled in excess of 7½ per day and 37½ per week was essential and necessary to enable the Company to complete the operations involved within the time limits required to meet delivery schedules under penalty of damages or cancellations in connection with orders placed by various industrial customers, including the Armed Forces of the United States.

8. That the said resolution of March 7, 1972 prohibiting the membership of Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, to work in excess of 7½ hours per day and 37½ hours per week was taken unilaterally without any prior negotiations with the Complainant or even any notice to the Complainant of its intent to unilaterally control production of the Complainant's employees represented by the said Respondent. Furthermore, said membership action of March 7, 1972 was taken without prior notice to the membership that such action was in contemplation or that there was an intent to take action with respect thereto.

9. That the sole and only purpose of said action of March 7, 1972 limiting the number of hours of daily or weekly work which the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, would "permit" the employees represented by it to perform, was to interfere with the production of the Complainant and to harass it and put economic pressure upon it so that the Complainant would yield to the demand made upon Complainant by the said Respondent in connection with current bargaining and the implementation of certain items which had been negotiated to an impasse and which could be put into effect by the Complainant because of the prior termination of the labor agreement between the Complainant and the Respondents and the non-existence of any current labor agreement.

10. That in and by said action which commenced on March 7, 1972 and has continued in effect to the date of the execution of this Complaint, the Respondent, Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, with the ratification and approval of the Respondent, District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, has engaged in a "concerted effort to interfere with (Complainant's) production" by means other than "by leaving the premises in an orderly manner for the purpose of going on strike" in violation of Section 111.06 (2)(h) and Section 111.06 (3) of the Wisconsin Statutes.

Wherefore, Complainant prays that Respondents be ordered to immediately cease and desist from in any manner or in any wise implementing or giving effect to said action of March 7, 1972 and affirmatively advise the employees of the Complainant represented by the Respondents that said action by the Respondents was illegal and that the employees should perform their obligations to the Complainant in all ways unaffected by said action taken on March 7, 1972. In addition to such relief, Complainant prays for such other relief as may be appropriate and proper to give full and adequate relief to the Complainant for said illegal action.

PECK, BRIGDEN, PETAJAN,
LINDNER, HONZIK & PECK, s.c.
Attorneys for Complainant
700 North Water Street
Milwaukee, Wisconsin 53202

(Jurat omitted in printing.)

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSIONER

(Title omitted in printing)

MOTION

(Filed June 23, 1972)

Now comes the above named respondents by their attorneys, Gratz & Shneidman, by Robert E. Gratz, and respectfully moves the Wisconsin Employment Relations Commission to dismiss the complaint herein on the following basis:

1. That the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint in that the activity therein complained of is arguably prohibited by the National Labor Relations Act, as amended.

2. That the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint and that those provisions of the Wisconsin Employment Peace Act alleged by the complainant herein to have been violated is unconstitutional and in conflict with the National Labor Relations Act, as amended, and the activities of the respondents complained of are pre-empted by said federal Act.

Respondents further move the Wisconsin Employment Relations Commission to fix July 14, 1972 at 10:00 A. M. for the taking of evidence and argument with respect to the motions hereinbefore set forth; and that any and all evidence that be taken on said date concerning the merits of the complaint be deferred indefinitely; and that respondents' obligation to file an

answer be deferred until such time as the motions herein are determined.

Dated at Milwaukee, Wisconsin this ... day of June, 1972.

GRATZ & SHNEIDMAN
By /s/ ROBERT E. GRATZ

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

(Title omitted in printing)

ANSWER

(Filed June 30, 1972)

Now comes the above named respondents by their attorneys, Gratz & Shneidman by Robert E. Gratz, and for answer to the complaint filed herein admit, deny, allege and show to the Commission as follows:

1. Respondents admit all of the allegations contained in paragraphs 1, 2, 3 and 4 of the complaint.

2. In answer to paragraph 5 of the complaint, respondents allege that for a period of approximately 17 years, the respondent Lodge 76 and its predecessor local union were parties to a collective bargaining agreement with Kearney Trecker Corporation wherein the parties established the normal work day of 7½ hours per day and 37½ hours per week; that the most recent contract between the respondent Lodge 76 and the complaining corporation expired in March, 1971; and that for a period of approximately a year and one-half, the complainant corporation

and respondent Lodge 76 have been unable to reach agreement with respect to the terms and conditions of a collective bargaining agreement; that one of the areas in dispute between said parties was the complainant corporation's proposal to modify the 7½ hour day and 37½ hour week to 8 hours and 40 hours, respectively, for the payment of overtime and enjoyment of other related benefits; that on March 1 and March 3, 1972, the complainant corporation notified the respondent Lodge 76 and its individual members that it was unilaterally establishing a 8 hour day and 40 hour week commencing March 13, 1972; that in response to said proposed unilateral action by the complaining corporation, respondent Lodge 76 did on March 7, 1972 call a meeting of its membership for the purpose of conducting a strike ballot required by the constitution and by-laws of said Lodge and the International Union of which it is a component part; that after said strike ballot was in fact conducted, a member of Lodge 76 made a motion which was adopted wherein the employees of the complaining corporation agreed not to work in excess of 7½ hours per day and 37½ hours per week.

3. Respondents deny having any knowledge concerning the allegations contained in paragraph numbered 6 of the complainant and puts complainant to its proof thereon.

4. Respondents deny all of the allegations contained in paragraph numbered 7 of the complaint; respondents further allege that subsequent to March 7, 1972 and up to and including the present time, that there have been on layoff in the production and maintenance unit represented by Lodge 76 between 350 and 450 employees available for recall to perform essential and necessary work and for said complaining corporation to complete the operations within the time limits required by any and all of its contracts by recalling said laid off employees on the bargaining unit.

5. Answering paragraph numbered 8 of the complaint, respondents allege that the resolution and motion of March 7, 1972 was in response to the complainant corporation's advice on March 1 and March 3, 1972 that it was unilaterally going to change the hours of work that had existed prior thereto for a period of approximately 17 years; that respondents further allege that the meeting of March 7, 1972 and purpose thereof was not announced prior to said meeting to the membership or anyone else and that in addition to the strike vote, the action and motion passed with respect to hours of work was one of the items to be considered at said meeting.

6. Respondents deny all of the allegations and legal conclusions contained in paragraph numbered 9 of the complaint.

7. Respondents deny all of the allegations contained in paragraph numbered 10 and further denies specifically with respect thereto, that the actions have continued in effect and that District No. 10 either ratified or approved any such actions; respondents further deny that even if said actions have and are taking place, that said actions are a concerted effort to interfere with production in contravention of the sections referred to in paragraph numbered 10 of the complaint.

And for Separate Answer

1. Respondents allege that the complainant corporation is an employer engaged in an industry affecting commerce within the meaning of the Labor Management Relations Act of 1947, as amended; and further alleges that the respondents are unions representing employees engaged in an industry affecting commerce within the meaning of the same Act.

2. That the respondents allege that the Wisconsin Employment Relations Commission has no jurisdiction over the subject

matter of the complaint in that the activity herein complained of is the subject of an unfair labor practice charge with respect to the identical activities currently pending before the Thirtieth Regional Office of the National Labor Relations Board wherein complainants herein contend that the precise activity constitutes a violation under Section 8 of the federal Act.

3. That the respondents allege that the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint in that said activity is protected under Section 13 and Section 501 (2) of the Labor Management Relations Act of 1947, as amended.

4. Respondents further allege that the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint and that the provisions of the Wisconsin Employment Peace Act alleged by the complainant herein to have been violated is unconstitutional and in conflict with the Labor Management Relations Act of 1947, as amended, and the activity of the respondents complained of are pre-empted by said federal Act.

Wherefore, respondents respectfully request dismissal of the complaint herein on the basis that the Wisconsin Employment Relations Commission has no jurisdiction of the subject matter and further requests dismissal of the complaint upon the merits.

GRATZ & SHNEIDMAN
Attorneys for the Respondents

P.O. Address:
735 West Wisconsin Avenue
Milwaukee, Wisconsin 53233

(Jurat omitted in printing)

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

(Title omitted in printing)

PETITION FOR REVIEW

(Filed March 13, 1973)

Now come the above named Respondents by Gratz, Shneidman & Myers, by Robert E. Gratz, their attorney, and for petition for review in the above captioned matter, allege and show to the Wisconsin Employment Relations Commission as follows:

1. That on February 26, 1973, Examiner George R. Fleischli issued certain findings of fact and conclusions of law and order in the above captioned matter.

2. That pursuant to the Wisconsin Administrative Code pertaining to the Wisconsin Employment Relations Board, more particularly E.R.B. 12.09(2)(b), your Respondents allege that a substantial question of law and administrative policy is raised by the legal conclusions contained in said findings of fact, conclusions of law hereinabove referred to issued by Examiner Fleischli.

3. That your Respondents are aggrieved by the conclusions of law aforesaid and accordance with their position stated at the time of hearing and in subsequent briefs claim that the conclusions of law made by Examiner Fleischli are in error for the following reasons:

A. That the controversy here in question is moot.

B. That the activities found by the Examiner Fleischli to have violated the prohibited practices with respect to the Respondents herein are pre-empted by federal law.

Dated at Milwaukee, Wisconsin this 12th day of March, 1973.

LODGE 76 AND DISTRICT NO. 10,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO
By /s/ ROBERT E. GRATZ
Their Attorney

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT

Lodge 76 International Association of Machinists and Aerospace Workers, AFL-CIO, and District No. 10 International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioners, vs. Wisconsin Employment Relations Commission, Respondent.	Case No. 410071 Judge Landry

PETITION FOR REVIEW

(Filed May 7, 1973)

Now come the above named petitioners by their attorney, Robert E. Gratz, and for cause of action allege and show to the court as follows:

1. That your petitioner, Lodge 76 International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organizations representing production and maintenance employees of the Kearney & Trecker Corporation located in Milwaukee County, Wisconsin; and that the office and place of business of your petitioner Lodge 76 is also located in Milwaukee County, Wisconsin; that your petitioner, District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization representing employees in Milwaukee County and elsewhere and among its constituent Locals also represents the members of Lodge 76; that the principal place of business of petitioner District No. 10 is 624 North 24th Street in the City of Milwaukee, Milwaukee County, State of Wisconsin.

2. That the Wisconsin Employment Relations Commission is and at all times hereinafter mentioned was an administrative body created and existing pursuant to Chapter 111 of the Statutes of the State of Wisconsin and that Morris Slavney is the Chairman and Zel Rice and Joseph B. Kerkman are Commissioners and members of said Commission.

3. That Kearney & Trecker Corporation is an employer engaged in the manufacture of machine tools in the City of West Allis, Milwaukee County, Wisconsin, and presently employs approximately 850 members represented by the petitioning Lodge 76 and District No. 10.

4. That heretofore the Kearney & Trecker Corporation did file a complaint with the respondent Commission alleging that your petitioners had committed certain unfair labor practices within the meaning of Chapter 111 of the Wisconsin Statutes; that after due hearing and briefs filed by the respective parties, an Examiner of the Commission on February 26, 1973 issued findings of fact, conclusions of law and order with respect to same and found that your petitioners had violated the Act in

respect to that complained of by the Kearney & Trecker Corporation; that in accordance with the administrative code, your petitioners appealed the decision of the Examiner to the three Commissioners and on April 23, 1973, the Commissioners affirmed the Examiner's findings of fact, conclusions of law and order.

5. Your petitioners allege that they are aggrieved and directly affected by the decision of the respondent Commission and your petitioners allege that the affirmed findings of fact, conclusions of law and order should be reversed on the following grounds:

A. That, said findings, decision and order are contrary to constitutional rights and privileges of your petitioners and the members they represent.

B. That the findings of fact, conclusions of law, decision and order of the respondent Commission is in excess of the statutory authority and jurisdiction of said Commission and also affected by other errors of law.

C. That said findings of fact, conclusions of law, order and decision is arbitrary and capricious.

Wherefore, your petitioners pray that the court enter a judgment reversing such decision and order of the respondent Commission and for such other relief as the facts and circumstances may warrant.

Dated at Milwaukee, Wisconsin this ..... day of May, 1973.

/s/ Robert E. Gratz
Attorney for Petitioners

Opinions, Orders and Judgments relevant hereto may be found in the Petition for Certiorari appendix as follows:

Appendix A—Order of the Supreme Court of Wisconsin Denying Petitioners' Motion for Rehearing .. A-1

Appendix B—Opinion and Judgment of the Supreme Court of Wisconsin A-2

Appendix C—Opinion and Judgment of the Circuit Court for Milwaukee County A-15

Appendix D—Order, Findings of Fact, Conclusions of Law and Supporting Memorandum of the Wisconsin Employment Relations Commission A-22

[56*] STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

(Title Omitted in Printing)

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Pursuant to notice, the above-entitled matter came on for hearing before an Examiner of the Wisconsin Employment Relations Commission in the Milwaukee State Office Building, Milwaukee, Wisconsin, on July 14, 1972 and August 3, 1972 at 10:00 a.m. o'clock on each day.

Present: George R. Fleischli, Examiner

Appearances: Peck, Brigden, Petajan, Lindner, Honzik & Peck, Attorneys at Law, by Egon W. Peck, appearing on behalf of the Complainant.

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* Numbers appearing in brackets in text indicate page numbers of the Record rather than the original stenographic transcript of testimony.

Gratz & Shneidman, Attorneys at Law, by Robert E. Gratz, appearing on behalf of the Respondents.

Whereupon the following proceedings were held:

• • • • • • • •

[59] Examiner Fleischli: The Official Reporter prepares the only official transcript of these proceedings and all citations in briefs and arguments must refer to the official record. Prior to going on the record today, the Complainant supplied me with a copy of what purports to be the collective bargaining agreement and it is my understanding that the Respondents have no objection to that being admitted as Exhibit No. 1.

Mr. Gratz: I have no objection. I think the record should note that this is an expired agreement terminated in March of 1971—June of 1971.

Examiner Fleischli: Were there any extensions or is that the expiration date provided?

Mr. Gratz: This contract was terminated by the Employer in June of 1971. There is no collective bargaining agreement in effect between the parties.

• • • • • • • •

[68] **MR. REYNOLDS OLSON TJENVOLD**
having been called as a Witness by Counsel for the Complainant and having been duly sworn on oath, was examined and testified as follows:

Direct Examination

Of Mr. Reynolds Olson Tjensvold by Mr. Peck

Q. Would you give your full name for the record, please?
A. Reynolds Olson Tjensvold, T-j-e-n-s-v-o-l-d.

Q. You're employed by Kearney & Trecker Corporation? A. Yes.

Q. Complainant in this action? A. Yes.

Q. What capacity? A. Manager, Labor Relations.

Q. You've been employed by Kearney & Trecker as Manager of Labor Relations since when? A. Since 1968 on my most recent tour of duty. I was there previously.

• • • • • • • •

[69] Q. Going forward from the last document, you will find a document identified as Company Exhibit No. 22. It is a letter dated June 22, 1971. Was that written and sent on about that date to Local Lodge 76? A. It was.

Q. We offer in evidence Company Exhibit No. 22.

Examiner Fleischli: Any objection?

Mr. Gratz: None.

Examiner Fleischli: Exhibit No. 22 is received.

(Document previously marked for identification as Complainant's Exhibit No. 22 was received in evidence.)

• • • • • • • •

Q. The next Exhibit, Company Exhibit No. 21, would you describe that? A. It's a letter of March 1, 1972 to Local Lodge 76 and it details the Company's forty-hour week proposal and it's **[70]** signed by Andrew K. Wilson, Vice President, Industrial Relations.

Q. And it was sent to the Local on or about that date? A. It was.

Q. We'll offer that in evidence as Company Exhibit No. 21.

Mr. Gratz: No objection.

Examiner Fleischli: It's admitted.

(Document previously marked for identification as Complainant's Exhibit No. 21 was received in evidence.)

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Q. Going forward in the binder, the next document, I believe, is Exhibit No. 19. A. Yes.

Q. Would you identify that? A. It is a copy of the handbill or flyer distributed by the Union at the plant gate. The headline is "K-T Imposes 40-Hr. Week!" And on the second page the key item is that this constitutes an advance notice of a mass meeting being called for Tuesday, March 7th by Lodge 76 Educational Committee. It was distributed at the plant gates to the employes as they entered or left the plant on March 3rd.

Q. On the second page your reference was to the bottom portion **[71]** reading "Advance Notice, A Mass Meeting Is Being Called for Tuesday, March 7, 1:30 P.M.—Serb Hall—Strike Sanction Vote Will Be Taken. Lodge 76, IAMAW Educational Committee." A. Correct.

Q. What is the Educational Committee of the Local? Do you know? A. One of the committees of the Union. The function, I assume, is to give the employes who are members of the Union information.

Q. We offer in evidence, Company Exhibit No. 19.

Mr. Gratz: No objection.

Examiner Fleischli: It's admitted.

(Document previously marked for identification as Complainant's Exhibit No. 19 was received in evidence.)

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Q. Company Exhibit No. 18 is what? A. That is a bulletin board notice posted by the Union, a copy of which was given to the Company and received by the Company on March 6th. The message on it is, "Lodge 76 Mass Meeting March 7, 1:30 P.M., Serb Hall, 5101 W. Oklahoma Ave."

Q. May I ask you, Mr. Tjensvold, whether or not the Company had been asked—strike that. Was March 7th a regular work day? A. Yes.

Q. Was 1:30 p.m. during the work hours? A. Yes, it was.

Q. Was there any request by the Union for permission to hold this meeting during the work hours? A. Not prior to the time that we received this notice for posting.

Q. Was there ever a request for permission? A. Not specifically as such but we were advised by the Union that they were holding this meeting on the 6th.

Q. They merely advised you that they were holding this meeting and they didn't ask for permission? A. That is correct.

* * * * * * *

[72] Q. Tell us about Company Exhibit No. 17. A. This is a document that was written by hand by A. K. Wilson to be given to the Union in a negotiating meeting that was being held on that date, Friday, March 10th at the offices of the Federal Mediation Service and as a result of the mass meeting that was held on March 7th, action was taken by the Union membership to refuse to work a 40-hour workweek which was to be started on the subsequent Monday and also that the employes would not work any overtime. At this meeting, also, as noted in the earlier handbill from the Union, the meeting was called for the purpose of taking a strike sanction authorization vote. That vote was taken. Strike sanction authorization was sought subsequently from the IAM in accordance with their constitution. But, the public press reporting the story said that a strike vote had been taken. As a result of that publicity the Commissioner of the Federal Mediation Service called both parites and asked if they could arrange for a meeting on their motion to discuss the matters which were apparently leading to a **[73]** strike. And it was on agreement from that call that this meeting on March 10th was held in the Federal Mediation office at that time. The principal problem that confronted us was the institution of the

40-hour workweek which had been an item at impasse from the negotiations dating back to the middle of 1971. And, in order to make it possible for us, in a clearer atmosphere, to negotiate, the Company offered this document as a proposal to defer for a period of two weeks, instituting the 40-hour workweek and, in return for that, asked the Union to assure that daily overtime would be worked as was required. And, the burden of this document is that this offer was made in order to make it possible for the Company to continue to operate with overtime which had been in effect for that period of time around the 10th and there were also recalls of employment going on at that time too.

Q. Prior to March 7th, had overtime been scheduled for various employes and had overtime been worked? A. Yes, it had. A substantial amount of overtime had been worked. On Saturday, many of the employes—I would say as high as three hundred out of the six hundred unit employes and during the week about an equal number or maybe a lesser number on a daily basis.

Q. The 40-hour workweek plan was not related to anything other than the creation of a new normal workweek rather than having just a 40-hour work limitation. Is that a fair statement? A. That's correct. Prior to this time, for a period of about seventeen years, the Company had had a 37½-hour workweek and a 7½-hour workday and overtime being paid for work beyond the 7½ hours a day or 37½ hours a week. In negotiations the proposal was made by the Company to have the normal 8-hour workday, 40-hour week and this matter was negotiated to impasse but was not put into effect as other impasse items were also negotiated to impasse had been in June of 1971 because the Company had said to the Union that they would not put the 40-hour workweek into effect until such time as recalls and overtime hours were being worked so that it would not be necessary to lay off employes.

Q. Let me be sure there's no misunderstanding. You used the terms, "putting the 40-hour workweek in effect." You were

not talking about a 40-hour workweek schedule but a 40-hour [74] workweek, normal workweek plan. A. A normal workweek of 40 hours a week and 8 hours a day.

Q. And that did not preclude overtime beyond that? A. No, there was no intention to preclude overtime.

Q. So when you were talking about 40 hours, that was not the limit. It was the basic—— A. (Interrupting) It was the normal workweek as defined in the agreement.

Q. Under the previous contract and under the normal 7½-hour workday and the normal 37½-hour workweek, what was the practice followed by the Company with reference to whether employes had to work overtime? Was it voluntary or mandatory? A. Well, overtime at Kearney & Trecker is at the employe's option. The employe is requested to work overtime and they may, for good reason or for no reason at all, reject overtime and not work it. This led, one time, to an elaborate procedure for scheduling overtime, altering selections and so forth. But, over the course of years the number of people who refused overtime consistently was at about 5% of those who were requested. So, other people had to be selected.

Q. Was there ever, prior to March 7th, any Union faction or any universal refusal of overtime? A. No.

Q. In the negotiations prior to March 7, 1972 was there any issue with reference to this matter of overtime introduced by either the Company or the Union other than what the normal workweek should be. A. There was no question of limiting or changing the terms of overtime other than, as I said, an elaborate mechanical system which we called MATRIX.

Q. What I am specifically referring to and asking you, Mr. Tpensvold is this. Was there, prior to March 7, 1972, of the Union's resolution with reference to prohibiting overtime was adopted, was there any indication to the Company that the Union

was objecting to overtime? A. No, sir, never any discussion on the subject.

* * * * * * *

[75] Examiner Fleischli: Exhibit No. 17 is admitted.

(Document previously marked for identification as Complainant's Exhibit No. 17 was received in evidence.)

* * * * * * *

[76] Q. All right, Mr. Tjensvold, would you go forward to a document consisting of two pages which I believe we have identified as Company Exhibit No. 15, dated March 11, 1972. A. It's a two-page document, handwritten, dated March 11, 1972 signed by A. K. Wilson for Kearney & Trecker Corporation.

Q. Now, maybe at this point it might be well, for the record, to identify Mr. A. K. Wilson. A. Andrew K. Wilson is the Vice-President of Industrial Relations for Kearney & Trecker.

* * * * * * *

Q. All right. Having identified Mr. Wilson, will you proceed? A. This document is a proposal, also in the continuing negotiations on that Saturday, and it proposes five points, the first of which is that the 40-hour workweek plan was to be instituted on the following Monday would be withdrawn and not considered an impasse item but would, instead, be subject to further negotiations.

The second paragraph indicates that it would not be instituted unless and until there was an agreement with respect [77] to a 40-hour normal workweek.

The third paragraph indicates the normal schedule, 7½ hours a day, 37½ hours a week would be continued thereafter until such an agreement change was reached.

And the fourth paragraph says that if, as and when overtime is scheduled, only daily overtime in excess of 30 minutes may be optional as all overtime had been prior to this time and that

the employes would be excused from overtime for reasons acceptable to Section Managers.

Q. Would you explain what, if anything, you know about the Section Manager situation? A. Well, heretofore the option of overtime was given to the supervisor when the employe said that he did or did not accept the offer to work overtime. Then the supervisor was empowered to accept whatever reasons he gave. Now, because of the need for additional hours of overtime, we didn't want there to be a variety of reasons for loss of the overtime and, therefore, excuses, or to be granted only by the Section Manager to whom the supervisors, first line supervisors, report.

Q. Go ahead. A. The fifth section deals with Saturday or Sunday overtime and it was stated there that they could be refused on the same basis as in the past. In other words, for any reason or for no reason And, the last paragraph of the proposal is unnumbered but it says this is subject to full cooperation of the bargaining committee and the employees in the implementation of the objectives of this agreement. The agreement, in this case, being limited to this five point proposal.

Q. During the course of—well, we offer in evidence, Company Exhibit No. 15.

Mr. Gratz: No objection.

Examiner Fleischli: It's admitted.

(Document previously marked for identification as Complainant's Exhibit No. 15 was received in evidence.)

Direct Examination of Mr. Tjensvold continued

Q. During the course of that meeting, you got an answer from the Union. Is that set out in what has been identified as Company Exhibit No. 14? A. That's correct. That's the Union's answer—the Union's answer to the Company's proposal. I see John David's hand again.

[78] Q. Is that in Mr. John David's handwriting? A. Yes. In this he answers the specific five points of the Wilson proposal by stating that items one, two and three are acceptable. Those are the items dealing with the withdrawal of the 40-hour workweek as an impasse item, the retention of the normal 37½ hour work schedule and there would be no changes until negotiated but that items four and five were not related to those and, therefore, were not acceptable. Those are the items relating to the overtime—the conditions of overtime and the second paragraph of the Union's answer states that we suggest that the moratorium on overtime be continued and that negotiations continue on all items. The Union will be available stating Monday, March 13, 1972 and hopefully a settlement can be reached in a short time.

Now, again, the Union made the recommendation in writing that negotiations continue and while this document is specific to that point there was a lot of discussion surrounding it.

Q. Referring to the discussion surrounding it, do you recall the discussion between myself and Mr. David in reference to Mr. David's request that on one hand there be a moratorium by the Company and my response as to a moratorium on the part of the Union? Do you remember that discussion? A. Yes.

Q. Would you testify as to what that discussion was? A. You said that because this moratorium had been established on a 40-hour workweek that the Company could reasonably expect a *quid pro quo* in the form of lifting the ban on overtime that had been enacted earlier that week.

Q. The March 7th meeting? A. The March 7th meeting. And Mr. David answered, as I recall, that this was a matter that he, himself, could not do but that it would require an action of the membership just as placing the ban on had done. He further recommended that there be a membership meeting called for the following Saturday. I believe that was the 18th, and that he would see to it that a membership meeting was called and that the matter of the overtime ban would be reconsidered.

He stated further that he hoped that the negotiations starting on Monday, the 13th, would be productive enough so that at the **[79]** time of the meeting of the 18th he could go before the membership with a complete contract for their consideration, not limited only to the matter of reconsideration of the overtime ban.

* * * * * * *

Q. Has there ever been any membership meeting at which the so-called *quid pro quo* of the lifting of the overtime ban of March 7th was presented to the membership for consideration? A. To my knowledge, there has been no membership meeting called for that purpose.

Q. Despite the fact that no membership meeting was called for that purpose, has the Company, in effect, continued the moratorium on the institution of the 40-hour workweek plan? A. Indeed it has. The normal workweek is 37½ hours. The normal day is 7½ hours.

Q. Did you attempt to schedule overtime since that time? A. Yes, we have but no overtime has been worked with the exception of three employes who worked on one Saturday.

Q. We'll get to that later on. We, at this time, offer Company Exhibit No. 14.

Mr. Gratz: I have no objection.

Examiner Fleischli: Exhibit No. 14 is received.

(Document previously marked for identification as Complainant's Exhibit No. 14 was received in evidence.)

* * * * * * *

[80] Q. Now, there is a document identified as Company Exhibit No. 13. A. Exhibit No. 13 is a handbill or flyer distributed by the Union to its members on March 16, 1972. It is signed by all members of the bargaining committee and noted it is published by Lodge 76 Educational Committee on March 16, 1972. An item of particular interest was the second paragraph,

a reminder. It says, "The Educational Committee wishes to remind you that even though the talks with the Company are continuing, the Policies voted on by the Production and Maintenance Employees Will continue in effect until a Labor Agreement is signed." The reference there is to the matter of——

* * * * * * *

Examiner Fleischli: Exhibit No. 13 is admitted.

(Document previously marked for identification as Complainant's Exhibit No. 13 was received in evidence.)

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Q. And has there been any announcement of any change of policy other than that which is stated in Company Exhibit No. 13? A. No, there is not.

Q. I'm referring now to Company Exhibit No. 12. A. Company Exhibit No. 12 is a letter of March 16, 1972, to **[81]** Local Lodge 76 signed by Andrew K. Wilson and this confirms the proposal that the Company made in the negotiations relative to abandoning the request for a 40-hour workweek and retaining the 37½-hour workweek and discussion about the need for the hours that are scheduled to be worked effectively and other changes that were then proposed, one of which involves pay for union lost time. One involves an across-the-board increase of 3% which was offered then for the first time and the terms of agreement which had been under discussion since the outset, the term of the new agreement, one year. Basically, this is what I referred to earlier as the concessions that the Company had made during that week of intensive negotiations in the hope that there would be a meeting on the 18th which these matters could be acted on by the membership.

Q. This was sent to the Local on March 16th? A. Yes, and it had been verbally given to them earlier and it was given to them in written form and confirmed what had been discussed.

Q. I'll offer this in evidence.

Mr. Gratz: No objection.

Examiner Fleischli: Exhibit No. 12 is received.

(Document previously marked for identification as Complainant's Exhibit No. 12 was received in evidence.)

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[82] Q. Company Exhibit No. 9, would you describe that? A. This is a copy of an open letter to Mr. Francis J. Trecker which was distributed as a handbill by the Union to the members of Lodge 76 and it is signed——

Q. (Interrupting) Was it distributed on June 1, 1972? A. June 1, 1972 and distributed on that date, and signed by Lodge 76 Educational Committee. It is, presumedly, an answer to some of the points that were raised in Mr. Trecker's letter, Exhibit No. 10, with added commentary. On the bottom of the **[83]** second page, "The Educational Committee has been informed that charges of 'Conduct Unbecoming a Member' have been filed against three (3) members of the Lodge who allegedly violated a directive of the membership which was passed at the last Mass Meeting." Was that the case of the three members who did work overtime?

Mr. Gratz: (Interjecting) I'll object to that as a conclusion by the Witness.

Examiner Fleischli: Is there any testimony that there were three employes that did work overtime?

Mr. Peck: Yes. He said that before.

Witness Tjensvold: Yes, I said that before.

Mr. Peck: What is the situation with the three employes that did work overtime?

Witness Tjensvold: All employees were scheduled for overtime work on, I believe it was the 13th of May, a Saturday, and

all of the employes refused to work overtime with the exception of three. Three did report for work.

Examiner Fleischli: I think any inferences that are being made——

Mr. Peck: (Interrupting) As Mr. Gratz said before, it speaks for itself.

Mr. Gratz: Right.

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Q. All right. We offer in evidence, Company Exhibit No. 9.

Mr. Gratz: No objection.

Examiner Fleischli: Exhibit No. 9 is received.

(Document previously marked for identification as Complainant's Exhibit No. 9 was received in evidence.)

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[84] Q. Then there was an amended charge, was there not, that's referred to as Company Exhibit No. 7? A. Yes, correct. This one is dated June 12th and it contains the charge initially made on June 9, 1972 plus two additional items.

Q. We offer into evidence Company Exhibit No. 7.

Mr. Gratz: No objection.

Examiner Fleischli: It's admitted.

(Document previously marked for identification as Complainant's Exhibit No. 7 was received in evidence.)

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[85] Q. Company Exhibit No. 3—is that the decision that the Company received from the Regional Director on the charge and the amended charge which are in evidence as Company Exhibits No. 6 and No. 7? A. Exhibit No. 3, dated June 27th to Mr. Peck from Mr. Squillacote with copies to the Company and District No. 10 and Lodge 76 and General Counsel, NLRB.

Q. There was some reference to an appeal having been taken from that decision. Would you testify with reference to your knowledge as to whether or not, in the appeal, there is any appeal with respect to the charge set out in Company Exhibit No. 8 and item number one—which is item number one in the amended charge? A. You're referring to Exhibit No. 7?

Q. Company Exhibit No. 7. A. No. 7 is the amended charge.

Q. There was no appeal from items 1(a) or (b) or from the original charge which is Company Exhibit No. 8? A. The appeal is on item two and three of Exhibit No. 7.

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[86] Q. I understand Ron Meyer is going to—or Andy Wilson—I just wanted to be sure that we know which ones—Company Exhibit No. 1, is that the number of Production and Maintenance Employes on overtime to meet production requirements? A. That's correct.

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[87] Mr. Peck: Just so we don't slip up. We offer Company Exhibit No. 5. We will reserve offering Company Exhibit No. 2 until we get some testimony from another Witness and Exhibit No. 1—are you familiar with these statistics in the preparation of Exhibit No. 1?

Witness Tjensvold: Yes, I am.

Direct Examination of Mr. Tjensvold Continued

Q. Did you prepare it? A. I prepared it.

Q. What is that intended to cover? A. It shows the number of employes who reported for work on an overtime basis on a number of Saturdays and one Sunday starting a year ago.

Q. You have, for example, July 10th, 17th, 24th and 31st. What does that mean? A. The numbers scheduled—the number scheuled at that time.

Q. That was not the case of the people working at that time? A. No. There was no overtime schedule during that period. During two of those weeks we had a partial plant shut-down at which time the employes, regardless of seniority, can elect that time for their vacation. And so because approximately only a third of the employes are at work during that period it's pointless to schedule overtime so none was scheduled.

Q. Well, the first overtime in 1971 that you had was August 7th. Was that the week beginning August 7th? A. No, that's Saturday, August 7th. This is only for Saturday with the exception of one day, February 27th, which was a Sunday.

Q. I see. In other words, this is merely a list of Saturday overtime—the number of employes working on Saturday. A. Right. The number who actually worked.

Q. And up to March 7th did you have any problem from the standpoint of satisfying your Saturday overtime requirements to the extent that overtime on Saturday was needed? **[88]** A. No, but as I indicated before, the refusal rate was about normal—about 5% of those who were asked, but then others were asked in their place.

Q. So the fact that you didn't have more overtime people work was consistent with the fact that this was all you needed at that time. A. That's right. I think Mr. Meyer will be able to explain how those numbers are arrived at.

Q. You referred to a plant shut-down. Did you also have a plant shut-down—— A. (Interrupting) That was in July, 1971 and again this year in July.

Q. How about between holidays, 1971? A. There was no overtime work scheduled—no work scheduled, as a matter of fact.

Q. Was the plant shut down? A. Yes.

Q. Taking the period from March 7th to the present time, there is an indication that three people on the first shift, on May 13th, did work overtime. A. That is correct.

Q. Are those the three people that you referred to in your previous testimony?

Mr. Gratz: (Interjecting) I'll object to that. I think it was already sustained, Mr. Peck, that Mr. Tjensvold was talking about a conclusion.

Mr. Peck: That's not my question. I said are those the three people who you said worked overtime?

Witness Tjensvold: Yes, they are.

Mr. Gratz: Okay.

Examiner Fleischli: Not necessarily the same three people.

Direct Examination of Mr. Tjensvold Continued

Q. Are there any other people besides those three who worked overtime? A. There are none.

Q. Were those same three people subsequently asked to work overtime? A. Subsequently?

Q. Yes. **[89]** A. Oh, yes.

Q. And what happened? A. They declined.

Q. That's all. We offer in evidence, by the way, Company Exhibit No. 1.

Mr. Gratz: The only objection I have to Company Exhibit No. 1 is utilization of the term "Union Mandate of No Overtime." That's your word, is it not?

Witness Tjensvold: That's my word. I heard it repeatedly from the Union by the committee. That's how I came to adopt it.

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Examiner Fleischli: All right, then. That is admitted.

(Document previously marked for identification as Complainant's Exhibit No. 1 was received in evidence.)

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Examiner Fleischli: That's admitted.

(Document previously marked for identification as Complainant's Exhibit No. 3 was received in evidence.)

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[90] Cross-Examination by Mr. Tjensvold by Mr. Gratz

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Q. Referring to Joint Exhibit No. 1, which is the expired agreement, commencement of negotiations was pursuant to a modification sent by the Union to the Employer. Is that correct? A. That's correct.

Q. And that took place approximately in October of 1970? A. November 2, 1970.

Q. And under the expiration provisions of the agreement—I'm referring to page 43 now, sir, particularly paragraph 213, there was a letter of modification rather than a letter of termination sent to the Union by the Employer. Is that correct? A. That's correct.

Q. The parties then, in fact, negotiated from November—— A. (Interrupting) Actually, the first negotiating meeting was held November 10th.

Q. The Union submitted its proposal prior to that time? A. At that time.

Q. Now, ultimately, who terminated this contract? A. The Company.

Q. And the Company terminated the contract by service of a 30-day notice pursuant to this section of the agreement. Is that correct? **[91]** A. Paragraph 213, yes.

Q. And that was done and the agreement was terminated in May to be effective thirty days thereafter? A. Right, 1971.

Q. Since that time the parties have been unable to reach an agreement with respect to the terms of the collective bargaining agreement. Is that correct? A. That is correct.

Q. There were a number of various issues affecting wages, hours and conditions of employment that were not agreed on as of the termination date of the agreement and that are still not agreed on. Is that a fair statement? A. That's a very fair statement.

Q. Now, with respect to a number of those issues, after the termination of the agreement, in what areas did the Employer unilaterally, that is without prior Union agreement, change the terms and conditions of employment that had existed during the term of the prior collective bargaining agreement? I want you to go over those individually as to when they occurred and how they were initiated.

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Q. Company Exhibit No. 22—— A. This spells out four purposes, for answering your question, the areas that were at impasse at the time the labor agreement was terminated by the Company on June 19th. There were four major items. Overtime, Union Lost Time, Seniority and the 40-Hour Workweek. On overtime the question was elimination of the MATRIX System. Union Lost Time was no pay for Union Lost Time except for meeting called by the Company. With Seniority there were a variety of items and some of those were put into effect at that time in accordance with this letter of June 22nd. Overtime was then allocated on the basis of the supervisors making the choice in accordance with some **[92]** guidelines that had been presented to the Union in the negotiations. Union Lost Time was not paid for subsequent to that time. Actually, the lost time was paid for but the Union was billed for it. To date we have not received payment from the Union on it.

Very few factors of seniority were actually put into effect. The temporary transfer procedure was used because it was necessary to transfer people. On about three occasions the Kearney & Trecker Journeyman provision was used but certainly the matter of permanent transfers were not a major item in effect. The reductions of manpower had pretty much taken place by that time so there's no change there.

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[94] Q. Mr. Tjensvold, you did indicate on June 22, 1971 to Mr. Wilson that there were going to be changes made that had existed in the prior agreement with respect to certain items. Isn't that correct? A. That's correct.

Q. And that was done without prior Union agreement? Is that correct? A. Those items were at impasse.

Q. And the Company, on June 22nd, notified the Union that this was what they were going to do with respect to these disputed items. Is that correct? A. As of June 28th.

Q. And did they, in fact, do so? A. Yes, they did, and at the same time put an increase in pay in for the employes.

Q. And did the Union agree to that increase? A. Nobody gave it back.

Q. The Union did not agree? A. No.

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[95] Q. Well, did the Company terminate the checkoff that was in effect after June 22 of '71? A. It was not an item of impasse but on the advice of our Counsel, we were found to be in violation of the law because no contract existed. Therefore, there could be no Union security.

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Q. When was the Union office eliminated in the plant? A. March 1, 1971. That, too, was not a matter of negotiations nor a matter of contract.

Q. But it was eliminated as of that date? A. Yes, it was.

Q. And that was done not by agreement? **[96]** A. It was not a part of the agreement before, then or after.

Q. You never agreed with the Union that you could do it or they didn't say go ahead? A. No, this was a commercial agreement for leasing space.

Q. Now, between June 22 of 1971 and March 1 of 1972, you operated in the manner indicated in your letter of June 22, 1971. Isn't that correct? A. That is correct. We observed all of the terms of the contract except those that had been at impasse and were changed with notification to the Union.

Q. And they were, in fact, changed and you operated that way up until March 1 of '72? A. On all items except the 40-hour week, correct.

Q. Now, on March 1 the Union, in fact, was notified of '72, that the Company again was going to unilaterally initiate an impasse item. Is that correct? A. Yes. It was done both in a meeting and by letter—a confirming letter.

Q. And on this one the Union responded rather affirmatively, did they not, sir? A. Yes, that's a very apt description.

Q. Now, we discussed a meeting, and it's part of the record, that was called on March 7th, during working hours. Did you object strenuously in writing or orally to the Union Committee or to Mr. David concerning the calling of that meeting? A. I personally objected to Mr. du Pont, the President of the Union and yet, at the same time we said that we were not going to stand in the way of a meeting being held but that we certainly deserved better than no prior notice for stoppage of work during the working day.

Q. Just so the record is clear, Mr. Tjensvold, this didn't happen on an intermittent but consistent basis, did it? What I mean is there was one meeting on March 7th of 1972 during working hours. Is that correct? A. That's correct.

Q. The Union didn't do this intermittently every week or every month? A. No.

Q. That's the only occasion since the termination of the agreement in June of 1971 that the Union had called a meeting **[97]** during working hours. Is that right? A. Well, there was one other but on that one we concurred.

Q. There was a prior arrangement with respect to it? A. That's correct.

Q. This is the only one where there was no prior arrangement? A. Right.

Q. This isn't a Briggs & Stratton arrangement as you know it then? A. No, it is not.

Mr. Peck: (Interjecting) You should have asked me. We're not making that contention. The whole thrust of our case is the March 7th action.

Mr. Gratz: All right.

Cross-Examination of Mr. Tjensvold Continued

Q. With respect to the 37½ and the 7½ hours per week and per day, respectively, you indicated that that had been in the prior agreement, certainly, and in many prior agreements for a period of approximately seventeen years. Is that correct? A. That is correct.

Q. Now, essentially the difference in computation of overtime where you have a 7½ hour day and a 37½ hour week, is that overtime, when worked, is computed after 7½ hours and after 37½ hours respectively? Isn't that correct? A. When that's the normal workweek and workday, yes.

Q. So that if the workweek were, in fact, changed to 8 and 40 respectively, overtime would not commence until the employe had, in fact, worked more than 8 hours or more than 40 hours respectively. Is that correct? A. That's correct.

Q. That was the substantial change, wasn't it? A. Well, that wasn't all there was to the change, however.

Q. What else was there to the change? A. What else there was to the change was that in the tender of the Company in this change of hours, there was additional pay to compensate for the premium pay that would be lost in the ensuing two and one-half hours of the week. In addition to that there was additional pay for the time itself which would be guaranteed. Everybody would be getting two and one-half hours more per week of work for which they would be paid and at a higher rate which was also tendered as part of the negotiated package.

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[100] Q. And at the present time, or let's say up to March 7th of 1972, how many employes were on layoff from the bargaining unit? A. Those with seniority in the neighborhood of three hundred and fifty to four hundred.

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[101] Q. Now, going back to Company Exhibit No. 1, if you will, Mr. Tjensvold. You compiled this list and during the month of March and up to June 24, did the Company or the Employer schedule overtime on any one of the days indicated? A. I can't say for sure but I do know that consistently since March 13th employees have been scheduled regularly—not all employes, but as needed.

Q. What I'm interested in knowing—you see, this record doesn't tell anyone—when you schedule, this shows that nobody, even if they were scheduled, in fact reported for overtime or accepted overtime but it does not indicate what days overtime **[102]** was scheduled when none of the employes, in fact, accepted it. A. I can tell you with reasonable assurance that from the date of March 13th on a substantial number of employes have been scheduled for overtime and have refused it.

Q. Does the Company continue to schedule overtime? A. Yes.

Q. And has the Company taken any disciplinary action where there has been an individual's refusal? A. No, it has not.

Q. And this has continued for the months of March, April, May, June and into July? A. The reason it has not is because the acceptance of overtime is optional to the employes. Therefore, we would be hard pressed to discipline an individual employe for not accepting overtime. However, if they accepted an overtime assignment and failed to report for work, then they would be subject to discipline.

Q. As you indicate, then, I take it that all of the employes who have turned down overtime have refused and not accepted and not reported. A. That is correct.

Q. So that you haven't disciplined anyone? A. No.

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[103] Q. Just one further question, Mr. Tjensvold, you understood, after the March 1 and 3, 1972 letter advising both the Union and the employes in the bargaining unit that the Company was going to initiate the 8-hour day and 40-hour week to become effective on March 13, 1972, that the reason the Union was meeting on March 17th was in response—or, on March 7th, was in response to that unilateral imposition of that program. A. I think that was clearly established that that was the reason.

Q. Have you initiated the 8-hour day or 40-hour week? A. We have not.

Q. Is it factually accurate that you were advised that if you did the employes would, in effect, still maintain the 7½ hour day and the 37½ hour week? A. That is correct.

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[104] **Redirect Examination** of Mr. Tjensvold by Mr. Peck

Q. Mr. Gratz seems to be allergic to the term that you used referring to the action of March 7th as a "mandate." Did you ever hear the Union use that expression in referring to the action of March 7th? A. Constantly.

Q. Tell us what they said. A. Well, in negotiations that followed that, we made every effort to——

Q. (Interrupting) When you say "followed that," be more specific. A. Following the meeting of March 7th we had a series of meetings in the presence of a mediator and in those meetings our attempt was to get the employes to work overtime. The bargaining committee, the spokesman for the Union, repeatedly said that they could not because it was a mandate of the membership that they must abide by to not work overtime, to not work 40 hours and to not work overtime, and that, as I quoted before, Mr. David said to us that he and the bargaining committee could not take any action to reverse that but they would have to have a membership meeting and that was the meeting that was presumedly planned for March 18th. But the word "mandate" was the description that was constantly used to describe that action.

Q. And what efforts has the Company made since then to get that mandate removed? A. In negotiations, first in the series that involved the Federal Mediators, we tried to reach an accord in a period of one week so that a meeting would be called so that there could be action and reconsideration was the word that was used—reconsideration of that mandate action. Subsequent to that another series of meetings ended up in a meeting of the membership in June of this year that presumedly would get us a contract and once we had a contract the mandate presumedly would be removed.

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[105] Q. This may have been covered but I want to be sure that insofar as Mr. Gratz reviewed with you the status of people on layoff, you did work overtime prior to March 7th when people were on layoff? A. Yes, we did.

Q. Did the Union, at any time, complain to the Company with reference to working overtime while people were on layoff? A. No, it did not.

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[106] **MR. RONALD MEYER**

having been called as a witness by counsel for the complainant and having been duly sworn on oath, was examined and testified as follows:

Direct Examination of Mr. Ronald Meyer by Mr. Peck

Q. Would you give your full name, please? A. Ronald Meyer, M-e-y-e-r.

Q. And you're employed by Kearney & Trecker Corporation? A. Correct.

Q. What capacity? A. Currently Manager of Manufacturing Research and Planning.

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[109] Q. Now, take in particular, Ron, the point there of recalling or hiring employes and relating back to the situation where you say that you have three shifts on a given machine and you want to utilize those machines for twenty-four hours each day. You couldn't accomplish that, could you, by calling in anybody? A. No. There's no possibility that you can because there is nothing to recall them to. The only thing you can do when a machine is manned three shifts is to investigate other methods of manufacture which is highly undesirable, partic-

ularly in the case of the more expensive numerically controlled machines because it's incredibly costly and also creates greater loads in centers which are not as desirable.

Secondarily, there is no way to call back when you have a machine occupied three shifts a day and you find **[110]** yourself having to schedule overtime as the only reasonable or viable alternative from a cost standpoint.

Examiner Fleischli: Can I clarify something for my benefit? By scheduling overtime, there are only twenty-four hours in a day. You're talking about Saturdays or Sundays?

Witness Meyer: Yes. When you're talking about overtime we have, where machines are manned three shifts a day, only the weekend is open to us—Saturdays and Sundays.

Examiner Fleischli: And the three half-hour periods which are not part of the normal workday?

Witness Meyer: It's not normal for us to use the half-hour lunch for operating purposes. There is an exception to that which involves the most expensive numerically controlled machines which are operated during the lunch by an alternate operator, normally a toolsetter type individual who operates machines during that period so that we can run them twenty-four hours a day.

Q. (By Mr. Peck) Now, is it practical to recall or hire a new employe or is there a provision in the labor contract or have you had any provision for part-time employes where you would hire people, new people, just to work on Saturday? A. No way.

Q. Saturday work is always overtime work? A. Yes, sir.

Q. You've never recalled or hired new people just for Saturday? A. No, way.

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[114] Q. What happened to the program that you had in mind after March 7th? A. Well, needless to say, we did not work

overtime. We did not call back the employes we had planned to call back.

Q. Why not? A. Well, the determination on that was made based on employes being asked to return to work were being influenced by the labor situation in the plant at the time and if they refused to come back, they would lose their seniority based on the contract language that we were attempting to adhere to.

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The situation at **[115]** that time, then, was to what other alternatives were available to us—no overtime and no callbacks—what else could we do? We began to reschedule machines. That is, instead of handling the load, we pushed it around. In the process of pushing the load around, you obviously push delivery dates around and, in essence, you begin to push customers around. We approached the Sales Division on the three specific occasions during the last several months asking them to define priorities for us. We were faced with some very critical orders from a variety of standpoints. Obviously, they were all critical because we promised somebody a machine which we were now unable to deliver. But there are other points beyond that. We have several contracts with the government which involve penalty clauses for failure to deliver on schedule. They have been and are now renegotiating contract prices to determine a new price level.

Q. On the penalty basis? A. On whatever basis they can renegotiate would be a penalty environment, yes. These special orders I talked about which are critical from a delivery standpoint to a whole new range of product environment that we hope to get into regarding machine system, these are computer controlled machine factors. Commitments have been made to customers to produce parts with these new centers and they are connected to their own product and production schedules and they are critical. They have, obviously, received a high priority. I could go on and on but the point here, that we've had

to shove machines around in terms of delivery several times and we have encountered the wrath of the customers in those circumstances.

Q. What about your ability to attract new orders? A. Our ability to attract new orders has been influenced by our ability to make the dates that we have promised in the past which has been gradually deteriorating. I'm sure that Andy will comment on that. It's not just the customers we hope to get but the customers we currently have who are being disappointed by our continued delays and who, I'm sure, are remembering the situation that they find themselves in.

At any rate, over a period of time we have had to give serious consideration to other means of improving our capacity and I'd like to comment on that for a moment. We accepted some **[116]** of these orders which we're now missing deliveries on and with penalty clauses that have been initiated by the government on a very low profit base in order to get the order. So, we find ourselves in a very poor cost environment under those circumstances. The additional problem we're faced with is how to get the capacity up, how to increase our capacity. The only way you can do that when you're not working overtime and if you can't call people back is to look somewhere else. For capacity, that's a very theoretical approach. Here's the plant's capacity. If you can't satisfy me there, we'll go somewhere else. It doesn't consider the cost. It takes time to do that.

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[117] Q. Those would be the departments that would be affected by that no overtime mandate? A. Oh, yes, yes. We're talking about the planing mills, cutoff saws, lathe department, departments like this which are incredibly overloaded at the present time and based upon **[118]** current manpower, can only turn out a certain amount of work.

Q. And you would work Saturdays if you had to? A. Yes, we'd do anything we could—Saturdays and Sundays. The particular problem we're working with now is because we have not worked overtime. In some centers we have fallen so far behind —in centers where we have been working three shifts of men and there is no reasonable way to recover. We're trying to find sub-contract sources for that kind of work but it's very difficult. There are very few companies with that kind of equipment and, usually, when they have it it's very busy. That's why we've always been successful in getting contract work in those kind of machines because it's the kind of equipment that very few people have and, therefore, we're able to provide a pretty valuable service from a contract standpoint to several customers who continually sent work in for us and this has created an additional problem in the specific centers. We have an overload of our own work but we, over the last two years, have just permitted ourselves to being a service for these other people—Manitowoc Engineering, Lytel, customers like this continue to give us work and we're trying to accommodate them and us on centers that are overloaded.

And, because of that, finding it necessary for us to sub-contract our own work in order to get it done on time. But, I think the important point here, to summarize this, is that we are currently very overloaded and literally out of control, attempting on a daily basis to rearrange the schedules and to minimize the impact of this capacity constraint, as I call it.

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[119] Q. I have one more question. I think it's a sort of restatement and I believe you may have covered it. Are we in control of production now, as a result of the overtime policy of the Union? A. Um-um.

Q. The answer is no? A. No.

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[121] **MR. ANDREW K. WILSON,**
having been called as a Witness by Counsel for the Complainant and having been duly sworn on oath, was examined and testified as follows:

Direct Examination of Mr. Andrew K. Wilson by Mr. Peck:

Q. Will you give your full name, please? A. Andrew K. Wilson.

Q. And your position with the Company? A. Vice-President, Industrial Relations, Kearney & Trecker Corporation.

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Q. Will you now please look at a document in the binder known as Company Exhibit No. 2? Do you have that before you? A. I have that before me.

Q. Will you identify that and explain it, please? A. This is a Defense Supply Agency letter written to our Vice-President of Sales, Mr. Harold Kippers, and incidentally it's not the only letter of its kind. These are coming in quite regularly. The letter implies that we are behind in our delivery and asks for us to come up with a realistic delivery [122] commitment and a negotiated penalty sum for failing to meet original delivery.

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Q. Promised delivery? A. Originally we'd promised to deliver three machines August 29th, four machines on September 28th and three machines October 28th. We currently have moved those out. The July delivery date of three machines are September 8th which is up five weeks. The three machines quoted for August 29th are out to November 25th which is three months. The four machines promised for September 28th are now December 1st and December 8th or two months out and the last order for three which were promised October 28th are December 15th and December 22nd, two months out.

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[132] Examiner Fleischli: Exhibit No. 2 is admitted.

(Document previously marked for identification as Complainant's Exhibit No. 2 was admitted in evidence.)

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Examiner Fleischli: In an off-the-record discussion the parties agreed to put the following stipulation on the record and that is that the Complainant in this case, Kearney & Trecker, is a Corporation doing business in interstate commerce and meets the self-imposed jurisdiction of limitations set by the National Labor Relations Board in administering the Federal labor laws.

Mr. Gratz: So stipulated.

Mr. Peck: Yes, insofar as interstate commerce requirements, it is subject to the provisions of the National Labor Relations Act.

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[138] **JOINT EXHIBIT 1**

Labor Agreement Between Kearney & Trecker Corporation and the International Association of Machinists and Aerospace Workers, AFL-CIO Lodge 76 of District 10 1969

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8. **Section 4.** Each employee, as a condition of continued employment, must, after his thirty-first (31st) day of employment, or the effective date of this Agreement, whichever is later, pay to the Union an initial fee of ten dollars ($10.00) and each month a service charge as a contribution toward the administration of this Agreement and the representation of such employee, provided, however, that

each employee will have available to him membership in the Union on the same terms and conditions as are available to every member of the Union. The service charge shall be in an amount equal to the Union's regular and usual monthly dues.

9. The Company agrees that it will each month deduct from the earnings of those employees who are employed within the bargaining unit, and who submit to the Company individual written assignments in proper form, the Union dues, or the service charges, whichever is stipulated, of said employees for the succeeding, month, and remit the same to such officer of the Union as it shall properly designate in writing to the Company. The amount of such monthly dues shall be certified to the Company by the Union.

* * * * * * * *

26. **Section 7.** No employee or Union Representative will be paid for any activity in behalf of the Union during working hours on the Company premises except as hereinafter provided and as limited by Paragraph 33:

27. Lost working time spent by Bargaining Committee members in meeting with the Company to negotiate the terms of new or revised Agreements as set forth in a Memorandum of Understanding dated May 14, 1969 entitled "Lost Working Time Due to Bargaining a New Labor Agreement," meeting to settle grievances in the Third Step of the grievance procedure; or meetings as agreed upon between the Company and the Bargaining Committee.

28. Time spent by a Steward in investigating complaints or grievances, and time spent by one of the following Union Representatives in assisting a Steward in interpreting the terms of the Labor Agreement: Bargaining, Job Evaluation, Time Study, Insurance or Retirement Plan Committeemen.

29. The Union Representative engaging in the activity as outlined in the preceding paragraphs, will keep to a minimum his lost working time. When it becomes necessary for him to stop working and engage in these allowable activities, he will adhere to the following procedure:

30. To insure that working time lost on legitimate Union business will be paid for, Union Representatives will clock out and indicate the reason on their labor ticket when presented to the Supervisor for his signature prior to their engaging in such Union business. All Union Representatives must advise their own Supervisors of the department to which they are going and the general reasons. Upon entering the other department, they must advise the Supervisor in charge who they are going to see and for what general reason and obtain his signature. (If he goes to the Union office, he will obtain the signature of the President of the Union or the Vice President if the President is absent.)

31. Upon returning to work, he will clock out on the labor ticket and inform his Supervisor that he has returned.

32. The Union Representative will follow the above procedure for meetings with Company Representatives and obtain the signature of the Company Representative conducting said meeting.

33. The Company will pay for lost working time as hereinabove set forth. However, the Union shall reimburse the Company for all such time paid for by the Company in excess of the first five hundred (500) hours paid for in each four-week accounting period. Lost working time of: (a) Union Time Study Representatives and of Union Job Evaluation Representatives in the performance of their duties as set forth in Paragraphs 28, 35, and 36; (b) Union Representatives in meetings called by the Company (other

than grievance meetings); and (c) members of the Union Bargaining Committee under the Memorandum of Understanding referred to in Paragraph 27 shall not be charged against the said five hundred (500) hour maximum pay liability assumed by the Company. Any unused part of the five hundred (500) hours above provided for may be accrued by the Union during the term of this Agreement.

* * * * * * * *

(p. 41)* ARTICLE XI

Management Clause

"203. The Management of the work and the direction of the working force including the right to hire, suspend or discharge for just cause, to assign to jobs, to transfer employees, to increase or decrease the working force, to determine products to be handled, produced or manufactured, the schedules and standards of production, and the methods, processes, or means of producing or handling, is vested exclusively in the Company, provided this right shall not be used for the purpose of discriminating against any member of the Union or to avoid any of the express provisions of this Agreement."

* * * * * * * *

(p. 78)* EXHIBIT "J"

Requirements of a Competent Workman
for Overtime Purposes Only

"295. Overtime assignments are made to expedite jobs which have fallen behind schedule for various reasons, or to assure

* The labor agreement booklet constituting Jt. Ex. 1 is a single "page" (p. 138) in the official record; the number in parenthesis is the page number in the booklet.

the delivery of customer's machine in the time specified on the order, so as to prevent cancellations or possible loss of future orders. Generally, when overtime is necessary a job has become critical and nothing can stand in the way of its completion."

* * * * * * * *

[139] **COMPANY EXHIBIT 1**

KEARNEY & TRECKER

Number of Production and Maintenance Employees on Overtime to Meet Production Requirements

	SHIFT			
Date	**First**	**Second**	**Third**	**Total**
1972				
Mar. 4	238	83	33	354

* * * * * * *

[142] **COMPANY EXHIBIT 3**

National Labor Relations Board, Region 30
Suite 230, Commerce Building, 744 North Fourth Street
Milwaukee, Wisconsin 53203 Telephone (414) 3855

June 27, 1972

Peck, Bridgen, Petajan, Lindner,
Honzik & Peck, S.C.
Attn: Egon W. Peck, Esq.
700 North Water Street
Milwaukee, Wisconsin 53202

Re: Local Lodge 76-I.A.M.A.W. (AFL-CIO) and
District 10, I.A.M.A.W. (AFL-CIO)
(Kearney & Trecker Corporation)
Case No. 38-CB-927

Dear Mr. Peck:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it appears that further proceedings are unwarranted at this time. The investigation revealed that the only charges filed against member employees were preferred by a fellow member for violation of the no overtime policy adopted by the Union. The only action which has been taken by Local Lodge 76 of this matter has been to initiate an investigation of the charge. In these circumstances, there has not occurred any disciplinary action by Local Lodge 76 which

might constitute a violation of 8(b)(1)(A). As to the other allegations contained in the charge, I do not find that there is a violation of Section 8(b)(3) of the Act. The failure by the Union to call a meeting on March 18 to discuss the overtime policy as well as the recommendation of the union's bargaining committee to reject the Company's proposal on June 8 are internal union matters and as such do not constitute bad-faith bargaining. As to the adoption by the Union on March 7, 1972 of a policy prohibiting overtime work by its member employees, this action does not appear to be in violation of the Act. *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477. Dismissal by this Agency does not necessarily preclude the Charging Party from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act. I am therefore refusing to issue complaint at this time.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the [143] General Counsel in Washington, D. C. by the close of business on July 10, 1972. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General

Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours

/s/ George Squillacote
Regional Director

Enclosures

Certified Mail

Return Receipt Requested

cc: Kearney & Trecker Corporation
Attn: Andrew K. Wilson, Vice-Pres.
11000 Theodore Trecker Way
West Allis, Wisconsin 53214

District No. 10, I.A.M., AFL-CIO
Attn: Kenneth Black, G.L.R.
50 West Oakton Street
Des Plaines, Illinois 60018

Local Lodge 76-I.A.M.A.W. (AFL-CIO)
and District 10, I.A.M.A.W. (AFL-CIO)
Attn: S. C. du Pont
11000 Theodore Trecker Way
West Allis, Wisconsin 53214
General Counsel
National Labor Relations Board
Washington, D. C. 20570

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[150] COMPANY EXHIBIT 7

Amended

United States of America
National Labor Relations Board
Charge Against Labor Organization or Its Agents

Instructions: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. Labor Organization or Its Agents Against Which Charge Is Brought:

a. Name: Local Lodge 76—I.A.M.A.W. (AFL-CIO) and District 10, I.A.M.A.W. (AFL-CIO).

b. Union Representative to Contact: S. C. du Pont.

c. Phone No.: 476-8300.

d. Address (Street, city, State and ZIP code): 11000 Theodore Trecker Way, West Allis, Wisconsin 53214.

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) 1(A) and (3) of the
(List Subsections)
National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.):

1(a). On or about March 7, 1972, and thereafter, the above-named Labor Organizations have required of employees in the bargaining unit represented by them, employed by the Employer, Kearney and Trecker Corporation, to refuse to work beyond 7½ hours per day or 37½ hours per week under penalty of Union discipline and by said actions restrained and coerced employees of said Employer in the exercise of the rights guaranteed under Section 7 of the Act.

(b). Further, said Labor Organizations on and since said date imposed such condition on said employees unilaterally and without bargaining with the Employer with respect thereto in violation of Section 8(b)(3) of the Act and has threatened to penalize employees who have disregarded said mandate.

2. From on or about January, 1971, to June 6, 1972, throughout the entire negotiations with the Bargaining Committee of the Unions concerning the terms of a new labor contract, the Bargaining Committee represented that it was under a mandate incorporated in a membership resolution not to submit to the membership for its consideration any proposal made by the Employer unless said **[151]** proposal was recommended for acceptance by the Committee.

Throughout the long negotiations, the Bargaining Committee refused many requests made by the Employer to submit its various proposals to the membership for its consideration on the oft repeated ground that it could not do so because of the said mandate and because they were unwilling to recommend for acceptance any of the proposals submitted by the Employer.

Relying upon this representation with respect to the membership mandate, on June 6, 1972, the Employer

made further revisions to its contract settlement proposal to meet suggestions made to the Employer by the Bargaining Committee as to what was required to enable it to submit the proposal to the membership. While the Bargaining Committee did submit the said proposal made by the Employer on June 6, 1972, to the membership for its consideration at a membership meeting held on June 8, 1972, it submitted said proposal to the membership with a written recommendation to the membership "to unanimously reject" said proposal. At said membership meeting of June 8, 1972, the said proposal made by the Employer was rejected.

By the said conduct above described, the Union violated its obligations under Section 8(b)(3) of the Act and it did not negotiate with the Employer in good faith as required by the Act.

3. Prior to March 13, 1972, the Employer's "normal" work day was 7½ hours and the Employer's "normal" work week was 37½ hours. Said normal work day and said normal work week have been provided for in prior labor agreements and were included in the labor agreement terminated on June 19, 1971. In the negotiations for a new labor agreement to succeed the agreement which was terminated on June 19, 1971, the Employer had proposed revising said normal work day and normal work week to eight (8) hours and forty (40) hours respectively and when the Union refused to agree to such revision, said issue was negotiated to an impasse. Despite the fact that said issue had been negotiated to an impasse long prior thereto, the Company deferred instituting the eight (8) hour day and forty (40) hour week until March 13, 1972. The Employer, on March 1, 1972, announced that the eight (8) hour day and forty (40)

hour week would be put into effect beginning on Monday, March 13, 1972. The Unions, in response to the said announcement of March 1, 1972, called a membership meeting which was held on March 7, 1972, and at said meeting took the action set out in the first unfair labor practice charge detailed above. On March 11, 1972, during the course of a conciliation conference, the Union requested the Company to withhold implementing the instituting of the change to a "normal" eight (8) hour day and a "normal" forty (40) hour week. The Employer, in response to the Unions' request, stated its willingness to do so provided the Unions' action in prohibiting overtime was rescinded and the status quo permitting overtime was restored. The Unions responded by stating that they could only do that by going to the membership and having the membership adopt a **[151]** resolution rescinding the mandate of March 7, 1972. The Unions, through their Business Agent, John David, replied that they would call a membership meeting for that purpose on a Saturday, March 18, 1972, and further added that if, in the meantime, the Committees could reach agreement on the terms of a new labor agreement, the membership would also be given an opportunity to consider the terms of the new labor agreement worked out between the Committees.

The Company relied upon the promises of the Unions to have the membership meeting on March 18, 1972, for the purpose of withdrawing the mandate prohibiting overtime. The Union, however, not only did not call a membership meeting as promised, but subsequently even denied, contrary to fact, that any such promise had been made and at no time since has the membership been requested to provide the *quid pro quo* which the Unions had promised as a consideration for

the Employer's withholding the implementation of the eight (8) hour day and forty (40) hour week which it had intended to institute effective March 13, 1972. By said conduct, the Unions violated the provisions of Section 8(b)(3) of the Act and did not negotiate with the Employer in good faith as required in said provision of the Act.

3. Name of Employer: Kearney and Trecker Corporation.

4. Location of Plant Involved (Street, city, State and ZIP code): 11000 Theodore Trecker Way, West Allis, Wisconsin 53214.

5. Type of Establishment (Factory, mine, wholesaler, etc.): Factory.

6. Identify Principal Product or Service: Machine Tools.

7. No. of Workers Employed: 625.

8. Full Name of Party Filing Charge: Kearney and Trecker Corporation.

9. Address of Party Filing Charge (Street, city, State and ZIP code): 11000 Theodore Trecker Way, West Allis, Wisconsin 53214.

10. Telephone No.: 476-8300.

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Andrew K. Wilson — Vice President
(Signature of representative of person making charge) — (Title or office, if any)

Address: 11000 Theodore Trecker Way, West Allis, Wisconsin 53214.

476-8300 — June 12, 1972
(Telephone number) — (Date)

[162] **COMPANY EXHIBIT 15**

(1 x 6) (1 of 6)

Until a new labor agreement is reached:

1. The 40 hour work week plan as set out in the letter from Mr. G. K. Wilson to the Union dated March 1, 1972, will not be considered an impasse item and will be a subject for further negotiations

2. Accordingly it will not be instituted unless and until an agreement is reached with respect thereto.

3. The normal work schedule of 7½ hours per day and 37½ hours per will be continued during said period.

4. If, as and when overtime is scheduled, only daily overtime in excess of 30 minutes may be optional. Employees may be excused from daily overtime (including said 30 minutes) for reasons acceptable to Section Manager

5. Saturday and/or Sunday overtime may be refused on the same basis as in the [illegible]

[163]

(2 of 2)

This agreement is subject to the full co-operation of the Bargaining Committee and the employees in the implementation of the objectives of this agreement.

G. K. Wilson

For: Kearney & Trecker Corp

[165] **COMPANY EXHIBIT 17**

Co X (11)

The Company will defer until Monday March 27, 1972 instituting the 40 hour work week plan as announced in its letter to the Union of March 1, 1972, in return: it is understood that daily overtime (in excess of 7½ hours) shall be part of the regular work schedule and cannot be refused, excepting for reasons acceptable to Supervision (Section Managers). However employees may refuse Saturday and/or Sunday overtime as in the past.

G. K. Wilson
For: Kearney & Trecker Corp
For: The Union

[170] **COMPANY EXHIBIT 21**

Kearney & Trecker Corporation
11000 Theodore Trecker Way
Milwaukee, Wisconsin, U.S.A. 53214
Phone 414-476-8300 . Telex 025-863 . Cable Treckermil

March 1, 1972

Local Lodge 76
11000 Theodore Trecker Way
Milwaukee, Wisconsin 53214

Gentlemen:

One of the items which was negotiated to an impasse was the Company's "40-hour work week proposal" concerning which our production and maintenance employees were advised in a communication we sent to them May 13, 1971. In it we stated, with reference to the 40-hour work week proposal, that it is the Company's intention to put the 40-hour week into effect "when the increase in production would otherwise make recalls necessary."

As you know, we are now working overtime in many areas. Under these circumstances, we can no longer delay putting the 40-hour work week into effect. In the light of the above, we hereby notify you that effective with the work week beginning on March 13, 1972 (with the third shift starting at 11:00 p.m. on Sunday, March 12, 1972), the 40-hour work week proposal will become effective.

This decision will have the following effect:

(1) The wage rate of all employees will be increased by seven cents (7¢) per hour.

(2) The regular weekly work schedule will be 40 hours instead of the previous 37½ hours and the daily work schedule will be 8 hours instead of 7½ hours. (With a 24-minute unpaid lunch period instead of the previous 30-minute unpaid lunch period.)

(3) Time and one-half at the new higher rate will be paid for all hours worked in excess of 8 per day, instead of the previous 7½ hours per day, and for all time in excess of 40 hours per week instead of the previous 37½ hours per week.

(4) In order to make this effective within the terms of the terminated Labor Agreement of 1969, all references and computations based on the 7½ hour day and the 37½ hour work week must be changed to 8 hours per day and 40 hours per week. Among the items so affected are these:

(a) Vacation benefits will be increased to 8 hours pay for each allowable day.

(b) Holidays occurring after the effective date of the 40-hour week will be paid at 8 hours pay at the employee's vacation hourly rate.

[171] (c) Jury duty pay will be increased to 8 hours per day.

(d) Military active duty pay reimbursement will be at 40 hours per week less military pay.

(5) As stated above, instead of the 30-minute unpaid lunch period provided for in paragraph 60 of the terminated Labor Agreement, except for the third shift, will be 24 minutes. There will be no assigned lunch period for employees working on the third shift.

(6) In conformity with our proposal that the third shift premium would be increased to make the pay for the

third shift employees equivalent to 40 hours, we are increasing the third shift premium from 8% to 18%.

(7) To conform to the new 40-hour work week the schedule of hours will be as follows:

Shift	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday
First						
Start		7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
End		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total						40.0 Hours
Second						
Start		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
End		11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
Hours		8.0	8.0	8.0	8.0	8.0
Total						40.0 Hours
Third						
Start	11:00 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm	
End	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am	
Hours	8.0	7.2	7.2	7.2	7.2	
Total					36.8 Hours*	

* (Shift premium will make pay equivalent to 40 hours.)

As stated in our letter to the Union dated June 22, 1971, "The Company wants to have a Labor Agreement and will continue to negotiate to get one." We also stated that we will otherwise continue to operate as we did previously, except for those changes which we listed and that "if more of the changes which were proposed in the Company's letter of May 13 are to be instituted, you will be notified of them in advance." This letter is in conformity with that promise.

Yours very truly

Kearney & Trecker Corporation
Andrew K. Wilson
Vice President
Industrial Relations

dw

[172] **COMPANY EXHIBIT 22**

Kearney & Trecker Corporation
11000 Theodore Trecker Way
Milwaukee, Wisconsin, U.S.A. 53214
Phone 414-476-8300—Telex 028-883—Cable Trackermil

June 22, 1971

To Our Production and Maintenance
Employees and Their Families:

This letter was given to the Union today notifying it of changes from provisions contained in our previous Labor Agreement and of an increase of 4% in pay for all unit employees effective Monday, June 28, 1971.

Local Lodge 76 IAMAW
11000 Theodore Trecker Way
West Allis, Wisconsin 53214

Gentlemen:

Because of an impasse in negotiations for a new Labor Agreement, we served the "30-day notice" on the Union to terminate the 1969 Labor Agreement. As a result, this Agreement was terminated on June 19, 1971. Although this Agreement has been terminated, we will continue to operate as though it were in effect except as you may be notified otherwise by us in advance of any contemplated changes.

Effective with the beginning of the work week June 28, 1971, we will put into effect the following items, as they were previously proposed to the Union by the Company:

Overtime

Overtime assignments will be made by supervision on the basis of "Guidelines" which were previously proposed to the Union, rather than by use of the "Matrix System".

Union Lost Time

Union lost time will be paid only for meetings called by the Company and for no other reason.

Seniority

Within the framework of the current *occupational group labor grade seniority*, these applications will be modified as shown below:

Permanent transfers will be based on skills already possessed with movement from overmanned job codes to undermanned job codes.

Temporary work assignments will be as at present, however, such assignments will continue for the duration of the temporary condition which made them necessary.

Reductions of manpower, when required, will be on an Occupational Group Labor Grade seniority basis with the added protection for an employee to move down in his "home" Occupational Group so long as he has seniority to hold, even though he may not have classified status in the lower labor grades. Reductions in the workforce shall be subject to the requisite skill, ability and efficiency to perform the required work.

[173] Kearney & Trecker Journeymen can be exempt from layoff in numbers equal to the number of Union representa-

tives for whom similar exceptions are provided in the Agreement.

A modified job category seniority grouping will be set up in the Renewment Division (REB Occupational Group) to be used there only.

The Company will furnish the Union with a quarterly seniority list, but other personnel information will be provided only as required by the Union for specific purposes.

In the event of a layoff, both the Union and the affected employees will be given at least two days notice.

The Company may institute reduced work-weeks for short periods of time to avoid increasing the number who must be laid off.

Wages

As reported in the May 13 letter, the Company's position has been that any measurable savings made as a result of these improvements in the Labor Agreement will be put into effect as wage increases. The above contract changes are equivalent to a 4.0% increase applied to the current wage lines. This wage improvement will be made effective at the beginning of the work week of June 28, 1971.

Summary

The Company wants to have a Labor Agreement and will continue to negotiate to get one. However, we feel that the long delay in finally getting such Agreement should not be used as the reason to deny our employees whatever wage benefits can be put into effect now.

As we stated at the beginning of this letter, we will continue to operate as though the terminated Agreement were still in effect except for the changes listed above. If more of the changes which were proposed in the Company's letter of May 13 are to be instituted, you will be notified of them in advance.

Sincerely yours

/s/ Andrew K. Wilson
Vice President
Industrial Relations

cp

cc: All Unit Employees
John Heidenreich
FMCS

3

Supreme Court, U. S.
FILED
AUG 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and KEARNEY & TRECKER CORPORATION,

Respondents.

BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS COMMISSION, IN OPPOSITION

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

CHARLES D. HOORNSTRA
Assistant Attorney General of Wisconsin

Attorneys for Respondent, Wisconsin Employment Relations Commission.

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702
608-266-8986

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United States Constitution

Article VI 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,
Respondents.

BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS COMMISSION, IN OPPOSITION

OPINIONS BELOW

Petitioners correctly state the relevant opinions below. See their petition, page 2.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. The commission agrees that this Court has jurisdiction under 28 U.S.C. §1257 (3) and §2101 (c).

QUESTION PRESENTED

Did the court below decide a substantial and important federal question contrary to applicable decisions of this Court when it held that a state does not offend Article VI of the United States Constitution by regulating a peaceful, concerted refusal to work overtime?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are properly referenced in the petition at page 3.

STATEMENT OF THE CASE[1]

Kearney & Trecker Corporation (employer) was party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10). The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, although it was executed on August 9, 1972, and contained an expiration date of July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wished to have a 40-hour week with a time-and-a-half pay rate for work over 8 hours in a day and 40 hours in a week. The union wished to retain the prior schedule of 37 1/2 hours a week with

[1]Following petitioners' symbols, hereafter "App." refers to petitioners' appendix and "A. App." refers to their appendix in the Wisconsin Supreme Court.

overtime rates applicable for work over 7 1/2 hours a day and 37 1/2 hours in a week.

On March 1, 1972, the employer announced that it was implementing its 40-hour week proposal effective March 12. On March 7 the union membership authorized a strike, and further resolved that no union member would work overtime, overtime being defined as work in excess of 7 1/2 hours a day or 37 1/2 hours a week (A. App. 153, 159). The employer and the union met on March 10 and 11 in unsuccessful attempts to resolve the pending crisis. Despite its March 1 announcement, the employer did not implement its 40-hour week proposal on March 12 or any time thereafter.

On March 16 the union "remind[ed]" its members that even though negotiations were still underway the "policies" voted on by membership "WILL continue in effect until" a new labor agreement was signed (Ex. 13 (R. 79, 160; A.App. 155)).

Prior to March 7 only 5 percent of the employes declined overtime work opportunities (A. App. 154). As many as 354 worked on Saturday, March 4 (Ex. 1 (R. 86, 139-140; A. App. 156)). After the union's March 7 meeting, however, all but three employes refused to work overtime (R. 87-88; A. App. 161-162). The employer suffered substantial damages as a result (A. App. 161-162).

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act, 29 U.S.C. sec. 151 *et seq.* (A. App. 163).

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union and District 10 violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S.C. sec. 158 (b) (3), by requiring the employes not to work overtime. On June 27, 1972, the NLRB Regional Director refused

to issue a complaint on the ground that the union's conduct was not prohibited by the National Labor Relations Act. The Regional Director added (A. App. 145):

> "* * * Dismissal by this Agency does not necessarily preclude the Charging Party [i.e., the employer] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). On February 26, 1973, a commission examiner found that the union, but not District 10, had authorized, encouraged and condoned the employes' concerted refusal to work overtime, that the design and effect was to interfere with the employer's production, and that the union had therefore violated sec. 111.06 (2) (h), Wis. Stats., which prohibits a concerted effort to interfere with production except in the case of strikes. The examiner ordered the union to cease and desist from so authorizing, encouraging and condoning and to take certain other affirmative action (App. A-33, 34, 35). The union's federal pre-emption argument was rejected (App. A-34, 44, 45, 46, 47, 48). The commission adopted the examiner's findings, conclusions and order as its own on April 23, 1973 (App. A-22, 23).

The union petitioned the Milwaukee circuit court for review. The commission counter-petitioned for enforcement. Employer intervened. On August 24, 1973, the circuit court entered its memorandum decision rejecting union's federal pre-emption argument (App. A-15-21), and on August 29, 1973, entered its judgment affirming and enforcing the commission's order.

The union appealed to the Wisconsin Supreme Court. The Wisconsin court unanimously affirmed the Milwaukee circuit court and also rejected the union's federal pre-emption argument (App. A-2-14). The union's motion for rehearing was denied without opinion on May 6, 1975.

The union filed and served its petition for a writ of certiorari to the Wisconsin Supreme Court by August 4, 1975.

ARGUMENT

The Court Below Did Not Decide A Substantial And Important Federal Question Contrary To Applicable Decisions Of This Court When It Held That A State Does Not Offend Article VI Of The United States Constitution By Regulating A Peaceful, Concerted Refusal To Work Overtime.

A. The federal question.

The commission agrees there is a federal question.

The commission disagrees with the union's formulation of the question on page 9 of its petition. The question is not whether Congress left the states free to influence the substantive terms to be embodied in a collective bargaining agreement by outlawing the conduct here. Rather, the question is whether the law of federal pre-emption ousts the states of power to regulate the instant conduct which is neither federally protected nor prohibited, to-wit: a peaceful, concerted refusal to work overtime.

B. There is no conflict.

The decision below presents no confrontation between a claimed state power and a competing federal rule. The only conflict is between the lower court's holding and the union's construction of federal law.

The union's construction is incorrect. It says the Wisconsin decision is directly contrary to *Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 280 (1964), and is contrary to the "teachings" of *Garner v. Teamsters C. & H. Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), and *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

Morton and *Garner* dealt with areas Congress had focused on. In *Morton* damages were awarded against a union based on Ohio secondary boycott law. This Court said, 377 U.S. at 259,260:

> "* * * If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe * * * the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available * * * 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' "

In *Garner* Congress had "taken in hand this particular type of controversy," 346 U.S. at 488. The picketing there was to induce union membership for which Congress had a "detailed prescription of a procedure," 346 U.S. at 499.

In respect to *Morton*, the Wisconsin court noted that this Court had upheld Wisconsin's power to ban intermittent and unannounced work stoppages, or "quickie" strikes, on the ground that "Policing of such conduct is left wholly to the states" in *International Union v. Wisconsin Employ. Rel. Bd.*, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121, hereafter *Briggs and Stratton*. The Wisconsin court then correctly said, App. A-14:

> "In *Morton* the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory

> treatment of secondary boycotts, Congress has not 'focused upon' partial or 'quickie' strikes. Policing of such conduct is left wholly to the states."

In respect to *Garner*, the Wisconsin court correctly said, A-7:

> "*Garner*, the union says, holds that states cannot regulate peaceful economic weapons left free by federal law. However, *Garner* dealt with an area Congress had 'taken in hand,' namely, inducements to union membership. Therefore, Pennsylvania procedures and processes could not operate. In *Garner*, a national labor act purpose was frustrated by the state action. That is not the situation in the instant case."

The union's response to the Wisconsin court's holding is to retreat and to look to *Insurance Agents*. Petition, p. 11. That case, however, merely held that the NLRB had no power to regulate strike tactics and left untouched the states' power to regulate certain partial strike activity such as that here.

Despite *Briggs and Stratton's* removal of strike tactics from the NLRB's purview, the NLRB in *Insurance Agents* had held certain partial strike tactics to be prohibited as a refusal to bargain. This Court held the NLRB was without jurisdiction to declare such strike tactics prohibited as a refusal to bargain in good faith even if the tactics were unprotected.

> "* * * we must evaluate the claim of the Board to power, under §8 (b) (3), to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining. We conclude its claim is without foundation" 361 U.S. at 492.
>
> "* * * It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it" 361 U.S. at 496.
>
> "* * * We may agree arguendo with the Board that this Court's decision in the Briggs-Stratton case * * *

> establishes that the employee conduct here was not a protected concerted activity. * * * But surely that a union activity is not protected * * * does not mean that it constitutes a refusal to bargain in good faith" 361 U.S. at 492-494.

It does not follow, as the union would have it, that Congress meant for the conduct to be free from state rules. It follows only that the NLRB cannot regulate these tactics as a matter of "good faith" bargaining. This Court did not reverse *Briggs and Stratton,* though the NLRB asked it to do so. Thus, this Court again recognized, as it had earlier in *Garner,*[2] that the NLRB might not be able to regulate conduct though a state could. *Insurance Agents,* therefore, left *Briggs and Stratton* untouched as to whether states can regulate such strike tactics.

The union alternatively asserts that Congress has focused on a concerted refusal to remain on the employer's premises. Petition, pp. 14-15. It cites legislative history for support. The "focus" this Court alluded to in *Garner* and *Morton,* however, were detailed and pervasive enactments of the Congress.

C. There is no special importance to reviewing this decision.

The union raises the spectre that all states might jump on the band wagon to tip the scales of power between labor and management. Petition, p. 15.

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[2]"This is not an instance of injurious conduct which the [NLRB] is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. [*Briggs & Stratton.*]" *Garner, supra,* 346 U.S. at 488.

This Wisconsin decision, however, is a narrow one. First, it relates only to a concerted refusal to work overtime, conduct long held unprotected by the NLRB, see *John S. Swift Company, Inc.,* 124 NLRB No. 46, 44 LRRM 1388 (1959), *enf.* 277 F. 2d 641 (7th Cir. 1960), and the courts, see *C.G. Conn., Ltd. v. N.L.R.B.,* 108 F. 2d 390, 397 (7th Cir. 1939), and *N.L.R.B. v. Kohler,* 220 F. 2d 3, 11 (7th Cir. 1955). Second, the decision does not assert power to be arbiter of all economic weaponry. The Wisconsin court carefully charted its course under *Morton, Garner, Insurance Agents* and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). The commission's examiner, whose decision ultimately was upheld by the Wisconsin court, noted that Wisconsin's statute could not operate in a pre-empted area. App. A-50, note 20.

The union further predicts state invasion of even federally protected conduct. Petition, pp. 16-17. The Wisconsin court, however, went out of its way to show its concern to adhere to all pre-emption rules. App. A-9. Moreover, the union mistakenly says the Wisconsin court drew a "nice" but incorrect distinction between scheduled or requested voluntary overtime and refusals to volunteer for it and indicated that sec. 7 of the NLRA protects overtime bans by unorganized workers but not when they are union-induced.[3]

Finally, by an implicit confession that the Wisconsin court's decision is in harmony with federal law, the union contends that the *Briggs and Stratton* encroachment on peaceful, economic weaponry must be pronounced dead. The erroneous assumption

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[3]The lower court simply noted arguments made in support of similar but different contentions. It decided the issues on another ground, however, to-wit: the controlling weight of the Board's decision in *Prince Lithograph Co.,* 205 NLRB No. 23, 83 LRRM 1654, 1973 CCH par. 25,614 (1973). See App. A-11-13.

is that peaceful, economic weaponry is a talisman to leave union conduct untouched. There are numerous illustrations to set this assumption aside.

First, in the federal sector the whole secondary boycott law aims to determine *which* peaceful, economic weaponry is permitted. See *NLRB v. Denver Bldg. & Constr. T. Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); *Local 761 v. NLRB*, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed. 2d 592 (1961); and *Sailors' Union (Moore Drydock)*, 92 NLRB No. 93, 27 LRRM 1108 (1950). Peaceful, economic pressures to induce work assignments are banned. See *NLRB v. Plasterers' Local Union*, 404 U.S. 116, 92 S.Ct. 360, 30 L.Ed. 2d 312 (1971). Recognitional picketing however peaceful is subject to substantial limitations. See sec. 8 (b) (7), 29 U.S.C. sec. 158 (b) (7); *Dallas Building and Construction Trades Council v. N.L.R.B.*, 396 F. 2d 677 (D.C. Cir. 1968); and *Connell Co. v. Plumbers & Steamfitters*, — U.S. —, 95 S.Ct. 1830, 44 L.Ed. 2d 418 (1975).

Second, in the federal-state area, three decisions of this Court make it crisply certain that the fact that union conduct is peaceful and economic does not *ipso facto* insulate it from state regulation. In *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965), this Court reversed the Wisconsin court's refusal to allow injunctive action in the case of peaceful picketing aimed to organize supervisors. This Court said, 382 U.S. 192-193:

> "Additionally, even if a [secondary boycott] violation were present * * * the Board has established that the workers sought to be organized are outside the regime of the Act. * * * Most importantly, the Board's decision on the supervisory question determines * * * that none of the conduct is arguably protected nor does it fall within some middle range impliedly withdrawn from state control."

In *American Radio Ass'n v. Mobile Steamship Ass'n Inc.*, — U.S. —, 95 S.Ct. 409, 418, 42 L.Ed. 2d 399 (1974), this Court said:

> ". . . [O]ur cases 'established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.' "

In *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 94 S.Ct. 959, 39 L.Ed. 2d 195 (1974), the question was whether states were precluded from enjoining picketing of foreign flag vessels to protest wages paid to foreign crew members. The Texas courts had held that *Garmon's* arguably protected or prohibited test pre-empted. This Court reversed, however, on the ground that Congress did not intend to intrude national labor law into the accommodations of international maritime trade. It follows, this Court said, that Texas could enjoin the picketing. 94 S.Ct. at 966.

In sum, then, the union seeks to expand *Morton*. Its ground is that its conduct is peaceful, economic weaponry. Neither *Morton, Garner*, nor *Insurance Agents*, however, erects such a talismanic rule. Rather, the union must show that Congress has focused on its conduct and subjected it to pervasive regulation. It

has failed. Further, this narrow *Morton* exception to *Garmon*[4] does not abridge *Briggs and Stratton*, itself a narrow holding as to certain partial strike tactics, which upheld Wisconsin's power to act under the very statute applied here.

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[4]The *Garmon* test was subsequently reaffirmed as the primary test for pre-emption in *Amalgamated Ass'n of Street etc. Employees v. Lockridge*, 403 U.S. 274, 291, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120:

> " 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the * * * Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. * * *' "

Federalism requires an easy rule:

> "* * * the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." 403 U.S. at 290.

CONCLUSION

It is respectfully submitted that the union's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY & TRECKER CORPORATION IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY & TRECKER CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203 (1975), and reprinted in Appendix B of the Petition (Pet. App. A-2 ff.). The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are not officially reported but appear as Appendix C and Appendix D to the Petition (Pet. App. A-15 ff. and A-22 ff.). The Circuit Court decision is unofficially reported at 88 LRRM 2920.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

May the State of Wisconsin prohibit a Union-directed concerted refusal to work overtime, a partial-strike activity which is neither protected nor prohibited by Federal law?

STATUTES INVOLVED

The relevant constitutional and statutory provisions are included in Appendix E of the Petition (Pet. App. A-52 ff.).

STATEMENT OF THE CASE

The Kearney & Trecker Corporation ("Kearney & Trecker" or "Employer") is engaged in the manufacture of machine tools at West Allis, Wisconsin. At all times relevant hereto, the hourly employees at Kearney & Trecker Corporation have been represented by Lodge 76, International Association of Machinists and Aerospace Workers ("Union" or "Lodge 76").

Prior to March 7, 1972, Kearney & Trecker employees represented by Lodge 76 had been scheduled for and had worked a "substantial amount" of overtime (A. App.[1] 154). In fact, on Saturday, March 4, 1972, approximately 354 employees worked overtime (Co. Ex. 1; A. App. 156; Supp. App.[2] 102; R. 86). Although employees

[1] Appellant's Appendix in the Supreme Court of Wisconsin ("A. App.").

[2] Intervenor-Respondent's Appendix in the Supreme Court of Wisconsin ("Supp. App.").

had previously been allowed, individually, to refuse overtime, there had been no general, or concerted, refusal to do so (A. App. 154). Only five percent of the employees had consistently declined to work overtime (A. App. 154).

On March 7, 1972, while negotiations for a new labor agreement were continuing, the members of the Union met pursuant to notice from the Union and unanimously adopted a resolution directing that no member should work overtime, overtime being defined as working in excess of 7½ hours per day or 37½ hours per week (A. App. 153, 159; R. 104-105). On March 16, representatives of the Union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the members "will continue in effect until a labor agreement is signed" (Ex. 13; R. 80, 160; A. App. 155). Despite requests from Kearney & Trecker, the Union declined to ask the membership to rescind the ban on overtime (A. App. 155). From March 11, 1972 until July 23, 1972 no employees worked overtime (with the exception of three employees who worked overtime on only one day), even though the Employer had scheduled many of the employees for overtime on numerous occasions during that period (A. App. 155-158).

On June 12, 1972, the Employer filed a charge with the National Labor Relations Board ("NLRB") alleging, among other things, that the Union had violated Section 8(b)(3) of the National Labor Relations Act, as amended, ("NLRA") 29 U.S.C. §158(b)(3), by its ban on overtime (Co. Ex. 7; A. App. 147-150). On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the Union's action was not

prohibited by the NLRA (Co. Ex. 3; A. App. 144-146). That refusal stated, in part:

> "Dismissal by this Agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act." (Co. Ex. 3; A. App. 145).

On June 15, 1972, the Employer filed a complaint with the Wisconsin Employment Relations Commission ("WERC") (A. App. 127). After a hearing, a WERC examiner found, on February 26, 1973, that the Union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the Employer's production and that the Union had therefore violated Section 111.06 (2) (h), Wis. Stats., which prohibits, *inter alia,* engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (Petition Appendix ["Pet. App."] A-53). The examiner rejected the Union's challenge to the WERC's jurisdiction on the basis of this Court's decision in *Garmon,*[1] concluding that "a concerted refusal to work overtime is neither a protected activity under Section 7 [of the NLRA] nor a prohibited activity under Section 8 of the [NLRA]" (Pet. App. A-48). The WERC unanimously adopted the examiner's decision as its own on April 23, 1973 (Pet. App. A-22-23). On August 24, 1973 that decision was affirmed by the Circuit Court of Milwaukee County which also rejected Petitioners' preemption arguments on the basis of prior decisions of this Court (Pet. App. A-15-19).

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[1] *San Diego Building Trades Council, et al. v. Garmon et al.,* 359 U.S. 236 (1959).

The Union then appealed to the Wisconsin Supreme Court. On appeal, the Union did not deny that it had violated the statute in question, but again argued that Wisconsin's authority to enjoin such conduct had been preempted by Federal law. Relying on prior decisions of this Court, including those in *Garmon, Garner,*[2] and *Briggs and Stratton,*[3] the Wisconsin Court unanimously rejected the Union's argument stating "since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the Federal Labor Act the judgment appealed from must be affirmed" (Pet. App. A-14).

ARGUMENT

I. CERTIORARI SHOULD BE DENIED SINCE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The challenged decision of the Wisconsin Supreme Court simply upheld the authority of Wisconsin to enjoin a union-directed concerted refusal to work overtime, a very specific, seldom used partial-strike tactic which has been *uniformly* held to be beyond the protection of Federal law by a long line of NLRB and Federal Court decisions. One of the many[4] such cases is *Valley City*

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[2] *Garner et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953).

[3] *International Union, UA.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), commonly referred to as *"Briggs and Stratton."*

[4] *E.g., John S. Swift Co.,* 124 NLRB 394 (1959), *modified and enf'd,* 277 F.2d 641 (7th Cir. 1960); *Decision, Inc.,* 166 NLRB 464 (1967); *First National Bank of Omaha v. NLRB,* 413 F.2d 921, 925 (8th Cir. 1969); *Prince Lithograph Co., Inc.,* 205 NLRB No. 23, 83 LRRM 1654, 1973 CCH NLRB ¶25,614; *Valley City Furniture Co.,* 110 NLRB 1589 (1954); *Polytech, Inc.,* 195 NLRB 695 (1972).

Furniture Co., 110 NLRB 1589 (1954), where, as here, the Union had resolved during bargaining to cease working overtime. The NLRB held that refusal to be unprotected, stating at 1594-1595:

> "We find that the partial strike [refusal of overtime] called by the Union from its very inception was the sort of activity which, although concerted, *is not,* as against the action by the Respondent, *entitled to the protection of the Act.* The vice in such a strike derives from two sources. First, the Union sought to bring about a condition that would be neither strike nor work. And, second, in doing so, the Union in effect was attempting to dictate the terms and conditions of employment. . . ." (Emphasis supplied).

The Board only recently reaffirmed and explained this line of decisions in *Polytech, Inc.*, 195 NLRB 695, 696 (1972), stating:

> "The holding . . . that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay. The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform *all of the work they were hired to do.*" (Emphasis supplied).

Contrary to Petitioners' assertion, the Wisconsin Court's decision, by its very terms, has *no impact whatsoever* on Federally protected strike activities or on the Federal regulation of activities proscribed by Federal law (Pet. App. A-8, 12, 14). That decision does not in any way expand, or seek to expand, the limited role of the states in the field of labor relations. On the contrary,

the Wisconsin Court expressly recognized in its decision that,

> ". . . a State may not regulate conduct arguably 'protected by sec. 7 or prohibited by sec. 8' of the National Labor Relations Act, . . . and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." (Pet. App. A-8).

The Wisconsin Court did conclude, correctly, on the basis of this Court's prior holdings, that a concerted refusal to work overtime is *neither* arguably protected nor prohibited, and that no legislative purpose precludes state action against such conduct.

Petitioners' predictions of grave consequences and infringements on protected rights if this decision is not reversed are totally unfounded. The Wisconsin statutory provision in question has been in existence in its present form for *36 years*. The authority of Wisconsin to utilize that very provision to prohibit *very similar* conduct was upheld by this Court *26 years ago* in *"Briggs and Stratton."*[5] Surely any such grave consequences would have occurred long ago — and Petitioners cite none. Moreover, this case is the *only reported instance*[6] during those 36 years in which Wisconsin has enjoined or even been asked to enjoin a concerted refusal to work overtime (Pet. App. A-49).

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[5] *International Union, U.A.W., A. F. of L., Local 232, et al. v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

[6] Undoubtedly, this tactic is not used more frequently precisely because it *is* unprotected under Federal law and participating employees may be disciplined by the employer. *E.g., Valley City Furniture Co.*, 110 NLRB 1589 (1954). *This* case arose because the employer chose to enjoin the perpetrating Union rather than discipline the individual employees who had been directed by the Union partially to withhold their services.

Having had no restraining effect upon strike activities or other concerted conduct protected by Federal law and being directed solely at the limited partial-strike conduct held *not* federally-protected by the NLRB and by the Federal courts, the policy of Wisconsin heretofore approved by this Court in *Briggs and Stratton* and now embodied in the decision of the Court below is one of extremely limited impact, and clearly does not present a substantial federal question. The Wisconsin Court's decision here, is thus not one appropriate for review by this Court.

II. THE DECISION OF THE WISCONSIN COURT DOES NOT CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT.

Petitioners try to show that the decision below is inconsistent with prior decisions of this Court, but that is simply not the case. To the contrary, this Court affirmed Wisconsin's right to enjoin *very similar conduct* on the basis of this very statute in *"Briggs and Stratton", supra.* There, the union in order to put pressure on the employer, called a series of union meetings during working hours and the WERC,[7] on the basis of the instant statute, issued an order enjoining the conduct. On appeal, this Court affirmed Wisconsin's right to forbid that conduct, stating (336 U.S. at 264-265):

> "We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was *neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act.* . . .

[7] Then known as Wisconsin Employment Relations Board ("WERB").

> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." (Emphasis supplied).

The Union's conduct, here, being quite similar to that involved in *Briggs and Stratton,* that holding is equally applicable to this case. In both cases, the Union allowed its members to work only a portion of their normal hours, thereby putting substantial economic pressure on the employer without imposing on the Union members the consequences of a strike. Both activities have repeatedly been held by the NLRB to constitute unprotected partial strikes. *E.g., Valley City Furniture Co., supra,* (concerted refusal to work overtime); *Daniel A. Donovan, et al.,* 206 NLRB No. 108, 1973 CCH NLRB ¶25,888, 85 LRRM 1227 (intermittent work stoppages); *Honolulu Rapid Transit Co.,* 110 NLRB 1806 (1954) (intermittent work stoppages).

This Court in *Briggs and Stratton* clearly indicated that its holding in that case was equally applicable to a concerted refusal to work overtime. In concluding that the work stoppages were not protected by Section 7 of the NLRA, this Court cited "similar cases" holding "comparable work stoppages" to be unprotected, including *C. G. Conn, Ltd. v. NLRB,*[8] which held a *concerted refusal to work overtime* to be unprotected. 336 U.S. at 257.

Notwithstanding Petitioners' assertions, the Wisconsin Court correctly concluded that *Briggs and Stratton* has never been overruled (Pet. App. A-13). Although this

[8] 108 F.2d 390 (7th Cir. 1939).

Court did decline, in *Garmon,* to follow the "approach" of *Briggs and Stratton,* under which the Court itself, rather than the NLRB, determined the protected or prohibited nature of the activity, that decision left untouched its substantive holding.[9] In fact, the continued vitality of the Court's substantive ruling in *Briggs and Stratton* was expressly confirmed by the concurring opinion in *Garmon*:

> "The Court may be correct in stating that 'the approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.' That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, . . ." (359 U.S. at 253, n. 5).

The decision here is also *fully* consistent with this Court's decision in *Garmon*[10] setting forth the controlling principles of federal preemption. There this Court stated,

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due

[9] The other decisions relied upon by Petitioners also do not support their contention that *Briggs and Stratton* has been overruled. In fact, the decision in *Garner, et al. v. Teamsters, etc. Local No. 776, et al.,* 346 U.S. 485 (1953) not only distinguished *Briggs and Stratton* but also cited it with *approval.* Similarly, the decision in *Local 20, Teamsters etc. v. Morton,* 377 U.S. 252 (1964) recognized only a very limited exception to the protected-prohibited test set forth in *Garmon* and did not overrule *Briggs and Stratton,* either expressly or by implication.

[10] *San Diego Building Trades Council, et al. v. Garmon, et al.,* 359 U.S. 236 (1959).

> regard for the federal enactment requires that state jurisdiction must yield."
>
> • • •
>
> ". . . When an activity is *arguably subject to §7 or §8 of the Act,* the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." (359 U.S. at 244-245; Emphasis supplied).

But, as the Wisconsin Court correctly found, the conduct here is *not even arguably* protected or prohibited by Federal law. The long line of NLRB and Federal court cases conclusively establishing the unprotected nature of this conduct has already been noted,[11] and not even the Union alleges that such conduct was arguably prohibited. Therefore, there can be no inconsistency with *Garmon.*

Petitioners erroneously contend that the Wisconsin Court's decision conflicts with *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964). In *Morton,* the action was brought pursuant to Section 303 of the Labor Management Relations Act (29 U.S.C. §187) which authorized suit by any person injured as a result of specified secondary conduct prohibited by that Section. The Ohio Federal District Court found that the Union had violated Section 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. This Court affirmed such finding of a "clear violation of §303." 377 U.S. at 256.

The Union in *Morton* had, however, engaged in another instance of secondary activity, a *direct* approach

[11] *See, supra,* p. 5, and Note 4, thereat.

by the Union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was *not* in violation of Section 303 since the Union had approached the neutral employer directly, rather than through its employees, the court, nevertheless, awarded damages on the basis of state common law.

This Court reversed the latter award, even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting:

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) *comprehensively* and with *great particularity* 'describes and condemns *specific union conduct* directed to *specific objectives.*'" (377 U.S. at 258; Emphasis supplied).

The Court concluded:

> "If the Ohio law of secondary boycott can be applied to proscribe the *same type of conduct* which Congress *focused upon but did not proscribe* when it enacted §303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, ..." (377 U.S. at 259-260; Emphasis supplied).

The decision in *Morton* is an exception[12] to the basic prohibited-protected test set forth in *Briggs and Stratton* and *Garmon*. However, that exception is an extremely narrow one, applicable only where Congress has "focused upon" the conduct in question without prohibiting it.

[12] Other limited exceptions, not relevant to this case, have also been recognized. For example, a state may enjoin violence even though it may also be an unfair labor practice. *United Automobile, A, & A.I.W. of America v. Wisconsin Employment Relations Board, et al.*, 351 U.S. 266 (1956); *International Union, etc. (UAW-CIO) v. Russell*, 356 U.S. 634 (1958).

Such is *not* the case here.[13] Unlike the very *comprehensive* statutory treatment of secondary boycotts, Congress has *not* "focused upon" partial or "quickie" strikes.[14] In fact, "policing of such conduct is left wholly to the states." *Briggs and Stratton*, 336 U.S. at 253. In the absence of such "focusing," there is simply no conflict with *Morton*.

Petitioners rely on the decision in *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960) to support their claim of a Congressional determination to deny the states the right to regulate unprotected partial strikes. Yet, *Insurance Agents* had *nothing whatsoever* to do with preemption or state power to regulate. That case simply held that similar disruptive tactics were not prohibited under Section 8 of the NLRA, and that the NLRB was not authorized by statute to function as an arbiter of economic weapons in administering the refusal to bargain provisions (Sections 8(a)(5) and 8(b)(3)) of the Federal Act.

The Wisconsin Circuit Court in this case correctly stated:

> "To conclude from this language [in *Insurance Agents*] that the State is barred by the doctrine of

[13] A *Morton*-like situation *would* be presented if Congress had outlawed recurrent and other forms of partial strikes without prohibiting a concerted refusal to work overtime.

[14] Petitioners' assertion of a Congressional determination to bar state regulation of such conduct by the defeat of a proposed amendment to the NLRA in 1947 is unfounded (Petition 14-15). That amendment would have prohibited only sit-down strikes and plant seizures and not the conduct here in question and it is impossible to determine why the provision was deleted. An equally plausible explanation is that state regulation was contemplated and deemed sufficient. In any case, the "focus[ing]" referred to in *Morton* was the *enactment* of legislation comprehensively regulating the specific conduct in question, not merely the introduction of a bill.

preemption is a giant step. The decision does not hold that state law does not apply, and to infer from the language employed by the court that it did would be tenuous. . . ." (Pet. App. A-19).

We respectfully submit that the decision of the Court below was not only consistent with, but compelled by this Court's holdings in *Briggs and Stratton* and *Garmon* and that the decisions in *Morton* and *Insurance Agents* have no application to the facts presented here.

III. THERE IS NO REASON FOR THIS COURT TO OVERRULE ITS DECISION IN *BRIGGS AND STRATTON* AND TO RADICALLY ALTER THE PREEMPTION STANDARDS ESTABLISHED IN *GARMON*.

It is Petitioners, not the Wisconsin Court, whose theories of preemption are inconsistent with the decisions of this Court. In reality, Petitioners would have this Court overrule *Briggs and Stratton* and alter the preemption standards set forth in *Garmon* by a radical expansion of the *Morton* exception. *They would classify some "self-help" weapons as protected, some as prohibited, and the remainder as "permitted."* In *each* case, the states would be *totally ousted* from control of that conduct. Rather than accept this Court's conclusion that "much . . . is left to the States,"[15] Petitioners would leave nothing. In effect, that result would immunize such "permitted" activities from *any* regulation, thereby according them a "protection" not intended either by Congress or by the holdings of either the NLRB or this Court.

[15] *Amalgamated Ass'n of Street, etc. Employees v. Lockridge,* 403 U.S. 274, 289 (1971).

We respectfully submit that the Union has shown no necessity[16] whatsoever for such a significant change. Under *Briggs and Stratton* and *Garmon,* the states are allowed to regulate only where the subject of that regulation is not arguably protected or prohibited, and where the conduct has not been comprehensively focused upon by Congress as in *Morton.* Operating within these limits, Wisconsin has developed a procedure whereby unprotected, improper Union-directed conduct can be dealt with by administrative agency (WERC) action against the offending Union rather than by self-defeating disciplinary action against individual employees. We see no reason to eliminate such procedures where there is no interference with Federally protected rights.

In *Lockridge,* this Court stated:

> ". . . While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect." (403 U.S. at 302).

We respectfully submit that Petitioners have not even come close to carrying that burden.

[16] There has been *no evidence* of any disruption or imbalance in labor relations in Wisconsin even though the statute in question has been in effect for 36 years.

CONCLUSION

The decision of the Wisconsin Supreme Court is plainly correct under the principles enunciated by this Court, and there is not presented a new or substantial federal question warranting review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and reprinted in the petition for writ of certiorari here (p. A-2ff).[1] The opinion of the

[1] References to pages of the appendix of the petition will be indicated "P. A-". Pages in the single appendix will be referenced "A".

Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are unreported but are printed here at P. A-15ff and P. A-22ff, respectively.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered on March 4, 1975. A timely petition for rehearing was denied on May 6, 1975 (p. A-1 of the petition for writ of certiorari), and within 90 days the petition for writ of certiorari was filed on August 2, 1975. It is timely. Cf. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). *United States v. Healy*, 376 U.S. 75, 78 (1964).

QUESTION PRESENTED

Does a State offend Article VI of the Constitution of the United States if it applies local standards respecting allowable collective bargaining weapons to outlaw peaceful concerted refusals to work voluntary overtime for an employer in interstate commerce, a self-help action permitted under the balance of power between labor and management expressed in national labor policy?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Constitution of the United States, of the National Labor Relations Act and of the Wisconsin Statutes are set out in Appendix A (*infra*, p. 33).

STATEMENT

On June 15, 1972 Kearney & Trecker Corporation (K & T or Employer) commenced this action before the Wisconsin Employment Relations Commission (Commission) to restrain Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (Lodge 76 or Union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10) from authorizing concerted refusals by K & T employees to work overtime (A. 3ff).[2] The Commission sustained the complaint, holding that Lodge 76 had committed an unfair labor practice under state law and entering a cease and desist order in the usual form. Ultimately, the Commission's order was upheld by the Supreme Court of Wisconsin.

K & T manufactures machine tools at its several Milwaukee area plants and engages in interstate commerce, meeting the jurisdictional standards set by the National Labor Relations Board (P. A-25; A. 47). Lodge 76 represents all of its hourly employees for purposes of collective bargaining, over 600 in number, and was party to a labor agreement signed in 1969 that, following notice from the Employer, terminated on June 19, 1971 (P. A-25—A-26; A. 21). Under that agreement, and for the past 17 years the basic work day was seven and one-half hours, Monday through Friday, for a basic work week of 37 and one-half hours. Hours worked in excess of the basic work day or basic work week were compensated at overtime rates (P. A-26). Acceptance of overtime work has always been optional, with the employee free to reject the offer (P. A-32; A. 22, 24, 39).

Negotiations for a successor agreement commenced in October 1970 and were not concluded until July 23, 1972, when

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[2] Collectively, Lodge 76 and District 10 will be termed the Unions.

the new contract took effect (P. A-26). In the bargaining K & T insisted that the basic work day and basic work week be lengthened to eight hours per day, Monday through Friday, and 40 hours per week, with the terms on which overtime would be payable restricted accordingly (P. A-27). Lodge 76 consistently rejected this demand, and by June 22, 1971, the parties had reached impasse on this and several other Employer proposals. On that date, K & T brought additional economic pressure to bear on the Union by making various unilateral changes in established working conditions (P. A-41). It stopped the check-off of Union dues, eliminated the Union's office in the plant, ceased paying employees for Union lost time, and, over the Union's objection, implemented the changes in overtime allocation, wages and seniority it had proposed (P. A-27, P. A-41; A. 18, 34-35, 66ff).

On March 1, 1972, although the parties remained at impasse, the Employer announced its decision to implement unilaterally, as of March 13, the changes in basic work day, basic work week and overtime pay it was demanding (P. A-27). In response, at a meeting on March 7,[3] the membership of Lodge 76 authorized its officers to request strike sanction and unanimously passed resolutions that no member should work overtime, defined as over seven and one-half hours per day and 37 and one-half hours per week (P. A-31; A.39). At bargaining sessions on March 10 and 11, K & T made two proposals, the effect of which was to defer implementation of the changes in work day, work week and overtime pay if the Union would agree that the employees could be compelled to work daily (but not weekend) overtime (P. A-31; A. 23-24, 60-62).

From March 7, 1972 until the new contract was settled on July 23, all but a few Union employees refused to accept the

[3] The Employer acquiesced in the holding of this meeting during working hours without much prior notice, and expressly repudiated any contention that this formed part of its § 111.06(2) (h) complaint against the Unions (A. 36-37).

overtime work proffered but continued to work the seven and one-half hour day and the 37 and one-half hour week (P. A-32-P. A-33; A.39). There was no strike or lockout. Despite its earlier announcement to the contrary, K & T chose not to implement its eight hour day and 40 hour week demands on March 13 or at any time thereafter. (P. A-39). Because acceptance of overtime work continued to be optional, the Employer did not impose any discipline on employees who refused to work the overtime scheduled during this period.[4]

Instead, over three months later, K & T turned to legal action to end the concerted activity. On June 12, 1972 it filed an unfair labor practice charge with Region 30 of the National Labor Relations Board and at the same time, commenced this proceeding before the Commission. On June 27, the Board's Regional Director dismissed the charge that the Union's overtime ban violated § 8(b)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 158(b)(3), on the ground that such conduct was not prohibited by the federal statute.[5] No appeal was taken from this ruling. (P.A-40, A. 30). However, its complaint that the activity was an unfair labor practice under the state law, § 111.06 (2)(h), Wis. Stats., was sustained by the Commission and by the Supreme Court of Wisconsin. From the outset and at all subsequent stages of the litigation, the Unions preserved in timely and proper fashion the question of federal preemption presented here.

[4] "Q. Does the Company continue to schedule overtime? A. Yes.

Q. And has the Company taken any disciplinary action where there has been an individual's refusal? A. No, it has not.

Q. And this has continued for the months of March, April, May, June and into July? A. The reason it has not is because the acceptance of overtime is optional to the employes. Therefore, we would be hard pressed to discipline an individual employe for not accepting overtime." (A. 38-39).

[5] Citing *Labor Board v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960).

The Commission concluded that state jurisdiction existed because the Union's conduct was "not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8" of the Act and was therefore subject to restraint under state law on the authority of this Court's holding in *Briggs-Stratton*,[6] and its understanding of the *Garmon*[7] test. On appeal, the Supreme Court of Wisconsin sustained state jurisdiction upon determinations that the Union's conduct was neither arguably protected nor arguably prohibited by the Act, and that state prohibition of the activity was not "contrary to any legislative purpose" of the federal statute (P. A-14). *Briggs-Stratton*, the court reasoned, was "authority" for the rule that Congress left plenary jurisdiction to the states to regulate what were termed "strike tactics" (P. A-10). This Court's holding in *Morton*[8] that a state may not bar self-help weapons which are merely permitted but not "arguably protected" from employer reprisal by § 7 was distinguished because secondary pressures rather than "partial strikes" were involved. Regulation of partial strikes, the court below held, is "left wholly to the states" (P. A-14).

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[6] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949), commonly known as *Briggs-Stratton*. The Commission concurred in the rationale that the "result" in *Briggs-Stratton* has survived this Court's repeated repudiation of its "approach". P. A.-46. It reached this conclusion reluctantly. The Commission found "persuasive" the argument that this "allow[ed] the states too great leeway to regulate the use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme" but felt compelled to reject the argument based on the test as phrased by this Court in *Garmon, infra*. (P. A-48)

[7] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[8] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

SUMMARY OF ARGUMENT

The states may not outlaw peaceful concerted activities permitted by the comprehensive federal statute in order to enforce narrower local concepts as to allowable collective bargaining weapons. Peaceful economic pressure not prohibited by § 8 of the Act cannot be forbidden by the states if the delicate balance of collective bargaining power between labor and management struck by Congress is to be preserved on a national basis as the legislature intended. Whatever may be the case as to the application of state trespass, libel and contract law to labor disputes, Congress did not enact the federal labor statute against the backdrop of state law as it related to the availability of peaceful worker weapons of self-help in the context of collective bargaining. Congress occupied this field when it established its own balance of economic forces, protecting some conduct from employer or union retaliation, prohibiting other pressures and leaving the rest to be controlled by the free play of economic self-help. Since the state law in question directly forbids the use of a federally permissible collective bargaining weapon and since, in any event, the asserted state interest comes down to a mere disagreement with the manner in which Congress accommodated the identical interests, the judgment below conflicts with the supremacy clause of the Constitution of the United States.

The will of Congress to occupy the field of permissible collective bargaining forces is demonstrated by its pervasive regulation of this crucial area, by uniformity interests that are implicit and explicit in its enactment, by the freedom of contract considerations that are at the core of its scheme, and by the nature of the legislative process that gave rise to the enactment of relevant provisions of this statute. In addition, since Congress deliberately rejected a proposal which quite likely would have outlawed the conduct in question here because it thought em-

ployer self-help sufficient in the circumstances, Wisconsin may not frustrate the federal determination to leave control over such concerted worker action to the free play of economic forces.

Only once, over 25 years ago, has this Court upheld the exertion of state power in this field. That decision is no longer authoritative and should be overruled or limited to its facts. Its essential premises have atrophied and been severely eroded by the clear pattern of later preemption decisions of this Court. Indeed, this Court has repudiated its approach on three occasions and openly questioned the viability of its substantive holding. Judicial effort to synthesize its aberrational holding with subsequent decisions have tended to obscure the ultimate foundations of the preemption doctrine and to yield a stated principle which has provoked conceptual difficulties more apparent than real.

In any event, since concerted exercise of a right to reject overtime is protected from employer interference by § 7 of the Act, black-letter preemption doctrine bars Wisconsin from restraining the exercise of the federal right. The National Labor Relations Board holds that § 7 protects concerted refusals to work voluntary overtime, i.e. where employees do not impose on their employer their own conditions of employment to perform the work. The court below patently misread the federal precedents in holding to the contrary.

ARGUMENT

I. The States May Not Outlaw Peaceful Concerted Activities Permitted by the Comprehensive National Labor Law by Enforcing Narrow Local Concepts as to Allowable Collective Bargaining Weapons.

A. An overview.

Only once, in the close to 30 years since the Taft-Hartley amendments were passed, has this Court upheld state limitation of peaceful employee economic pressure in support of lawful collective bargaining aims against an employer in commerce. The exception, *Briggs-Stratton*,[9] was decided by a bare majority in 1949, "at a time when the Court had not worked through the problems of accommodating state and federal labor laws."[10] Since then, on three occasions, this Court has repudiated its "approach" as affording inadequate protection for important federal interests,[11] and its substantive premises have been completely undermined and bypassed.[12] Judicial effort to synthesize its aberrational holding with subsequent decisions have tended to obscure the ultimate foundations of the doctrine and to yield a stated principle which, while possibly "capable of

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[9] *International Union, UAW v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949).

[10] Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1337, 1346 (1972).

[11] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, n. 4 (1959). *Labor Board v. Insurance Agents International Union, AFL-CIO*, 361 U.S. 477, n. 23 (1960); *Amalgamated Ass'n. of Street, etc. Employees v. Lockridge*, 403 U.S. 274, 291 (1971).

[12] See pp. 23-27, *infra*.

relatively easy application,"[13] has also provoked conceptual difficulties more apparent than real.[14]

The inquiry as to whether employee conduct may be regulated by the states is not the same as the question of whether it is actually or arguably protected from employer reprisal by § 7 of the Act.[15] "This Court has held repeatedly that federal law preempts state remedies that interfere with federal labor policy *or* with specific provisions of the NLRA."[16] At its core, federal labor policy expresses an "economic balance between labor and management, carefully formulated and preserved by Congress, in the federal labor statutes"[17] that leaves much activity that is neither protected nor prohibited to be "controlled by the free play of economic forces."[18]

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[13] *Amalgamated Ass'n v. Lockridge*, 403 U.S. at 289-290.

[14] See, e.g., the concurrence by Mr. Justice White in *International Longshoremen's Ass'n v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); his dissent in *Lockridge*, 403 U.S. at 309 ff; and Part II of his dissenting opinion in *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 154 (1971). These views seem rooted in the premise that § 7 sets the perimeters of the preemption doctrine and hence the presupposition that the states are free to impose further limits on peaceful employer or union weaponry beyond those set forth in § 8.

[15] Mr. Justice Harlan exposed the nerve of this difficulty in *Bhd. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 382, n. 17 (1969): "In the context of labor relations law, this word ['protected'] is fraught with ambiguity. 'Protected conduct' may, for example, refer to employee conduct which the States may not prohibit, see, e.g. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955), or to conduct against which the employer may not retaliate, cf. e.g., *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957)."

[16] *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, — U.S. —, 44 L.Ed. 2d 418, 433 (1975), emphasis added.

[17] *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 124 (1974).

[18] *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The test formulated here indicated no room at all for state policing of peaceful economic weapons. "The federal regulatory scheme (1) protects some activities, though not violence, (2) prohibits some practices, and (3) leave others to be controlled by the free play of economic forces."

At the same time, a "primary factor" leading to the enactment of a comprehensive national labor law, together with the establishment of a centralized expert agency to administer it, and therefore a touchstone for interpreting the preemptive legislative intent, was the

> "perceived incapacity of common law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among conflicting forces so as to further the common good."[19]

So the federal scheme is not neutral as to confidence in state law and tribunals to regulate with respect to areas of conduct implicating "policies central to federal labor law" such as the economic balance respecting employee organization or peaceful collective bargaining weapons.[20] This factor counsels a preemption rule that does not leave discernment and application of the fine points of federal labor policy to tribunals that Congress thought ill-equipped to make such judgments.

Whatever the fact may be as to state trespass laws of general application or as to traditional contract law doctrines applied to union-member relations, it simply cannot be said that Congress enacted and amended the NLRA against the "backdrop of state law" relating to allowable collective bargaining weapons or that economic self-help is of merely "peripheral concern" to federal labor policy.[21] On the contrary, the avail-

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[19] *Amalgamated Ass'n v. Lockridge*, 403 U.S. at 286: "The purpose of the Act", this Court said succinctly in *Nash-Finch*, "was to obtain 'uniform application' of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies' " 404 U.S. at 144.

[20] *Connell Constr. Co. v. Plumbers, etc. Local No. 100*, — U.S. at —, 44 L.Ed. 2d at 434. Cf. Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* 1339, 1352-1354.

[21] Cf. *Taggart v. Weinacker's*, 397 U.S. 223, 227-228 (1970) (concurring opinion) and *Lockridge*, 403 U.S. at 320, 324 (dissenting opinion). The "unmistakable focus of both the NLRA and the LMRA is on labor-management relations. . . ." *Id.*, at 320.

ability of peaceful self-help weapons to employees at impasse in collective bargaining is a "sphere in which the federal interest is especially pervasive"[22] because the "process of free and voluntary collective bargaining is the keystone of the federal scheme"[23] and state restraints will inevitably intrude into the "substantive aspects of the bargaining process to an extent Congress has not countenanced."[24] Because the Wisconsin statute works more than a possible "tangential frustration" of federal labor policy and, instead, directly forbids the use of a federally permissible economic weapon, no balancing of the relative importance of federal and state interests is warranted here.[25] In any case, since the Wisconsin law invades the federal sphere for no cognizable state interest, *i. e.*, only to rebalance more restrictively the same special interests of employers, unions and employees in labor disputes that Congress has already accommodated,[26] its application as to parties covered by the NLRA is repugnant to Article VI, cl. 2 of the Constitution of the United States.

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[22] *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Assoc.*, 382 U.S. 181, 193, n. 14 (1965).

[23] "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy." *Teamsters Union Local No. 174 v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

[24] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477, 498 (1960).

[25] Compare *ITT Lamp Division v. Minter*, 435 F.2d 989, 992 (1st Cir., 1970) [payment of welfare benefits to strikers] and *Grinnell Corporation v. Hackett*, 475 F.2d 449, 457, 461 (1st Cir., 1973) [same, unemployment compensation after seven weeks]. But see *Hawaiian Telephone Co. v. Hawaii*, — F. Supp. —, 90 LRRM 2854 (D. Haw, 1975).

[26] This Court recognized in *Briggs-Stratton* that the concern of § 111.06(2) (h) is with nothing more than union conduct thought too "coercive" of employer collective bargaining interest. 336 U.S. at 264-265.

B. In enacting and amending the federal statute, Congress struck a balance of protection, prohibition and liassez-faire in respect to collective bargaining that must occupy the field of economic weapons permissible under a uniform national labor policy.

The holding below that states have plenary power to regulate federally permissible partial strike activity conflicts directly with this Court's decision in *Morton*[27] and is contrary to the teachings of this Court in *Garner*,[28] *Insurance Agents*[29] and their progeny.

Morton stands squarely for the principle that a state cannot outlaw a peaceful weapon of self-help which is permitted but not arguably protected by the federal statute.[30] There, union members struck a trucking firm and, in a non-coercive manner, one of the business representatives persuaded a customer to refrain from using the services of the struck firm, activity permitted by the federal statute but for which the lower court had

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[27] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

[28] *Garner v. Teamsters, etc. Local No. 776*, 346 U.S. 485 (1953).

[29] *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

[30] Professor Lesnick, as part of his thesis that the "time has long since come to eschew entirely the traditional 'primary jurisdiction' rationale implicit in the 'protected or prohibited' aphorism" in favor of a "negative inference" rationale consistent with petitioners' position here, observes: "[T]he notion that there is no preemption if unprotected conduct is also not prohibited is simply not the law. * * * *Morton* is squarely dispositive of the point. . . ." Lesnick, "Preemption Reconsidered: The Apparent Reaffirmation of Garmon", 72 *Col. L. Rev.* 469, 472, 474 (1972). See also, Ratner, "Damage Actions and the Impact of the Morton Case", *18th Ann. NYU Conf. on Labor*, 117, 122 (1966): "*Morton* is significant also in that it finally lays to rest the notion that conduct which the . . . Act neither prohibits nor protects is necessarily outside the occupied field and therefore subject to state law."

awarded damages under state law. This Court, assuming the conduct to be neither arguably protected under § 7 nor prohibited under § 8,[31] nevertheless barred application of state law because it would upset the balance of power struck by Congress in the federal statute:

> "This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. Electrical Workers Local 761 v. Labor Board, 366 US 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national policy."[32]

The *Morton* premise extends to self-help weapons generally the *Garner* postulate that the Act is a comprehensive code which outlaws certain types of picketing but implicitly permits others not specifically prohibited and hence bars their restraint by the states as an obstruction of federal policy.[33]

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[31] 377 U.S. at 258.

[32] *Id.* at 259-260.

[33] "The detailed description of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the [NLRA] is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters, etc.*, 346 U.S. at 499-500.

The court below thought the *Garner-Morton* theory of legislatively sanctioned laissez-faire was inapposite because Congress has not "taken in hand" or "focused upon" concerted refusals to work overtime as it had upon picketing and secondary pressures.[34] But suggests that the federal statute regulates only interstitially the area of permissible collective bargaining weapons, a premise that is demonstrably incorrect. The federal statute comprehensively fixes when and for what reasons an employer may replace or discharge strikers,[35] unilaterally change working conditions;[36] or lock out his employees.[37] It leaves him free to blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, subcontracting or transferring work from one point to another.[38] Likewise, it deals exhaustively with the time and circumstances when

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[34] *Morton* may have been an "easy case" because it involved secondary pressures, but, as Professor Cox states, its "underlying principle . . . is one of broad application" reaching *any* state-imposed "restrictions upon labor's use of economic weapons going beyond NLRA section 8(b) in terms of prohibited objects or forms of economic pressure.' That underlying principle, according to Professor Cox, "explains more than the *Morton* case. It also supplies the ultimate foundation for the rule that state laws may not be used to restrict activities protected by Section 7." He propounds the rationalizing principle as follows: "Congress struck a balance of protection, prohibition and laissez faire in respect to union organization, collective bargaining and labor disputes that would be upset if a state could also enforce statutes or rules of decision resting upon its own views concerning accommodation of the same interests." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1352, 1354 (1972).

[35] *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1965); *Labor Board v. Fleetwood Trailer Co.*, 389 U.S. 375 (1965).

[36] *Labor Board v. Crompton Highland Mills, Inc.*, 337 U.S. 217 (1949); *Labor Board v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972).

[37] *American Ship Building Co. v. Labor Board*, 380 U.S. 300 (1965); *Labor Board v. Brown Food Store*, 380 U.S. 278 (1965).

[38] *Id.* at 283.

workers may strike;[39] the terms on which they may maximize economic pressure through internal discipline;[40] and with the extent to which partial strike activities are permitted[41] or even protected from employer reprisal.[42] In contrast with the "negative inference" deducible from such pervasive regulation of an area so central to federal concerns, Congress wrote only one provision, § 14(b), saving state power over the federally regulated subject matter.[43]

In particular, occupation of the field of partial strike activities by the federal scheme is dictated by the freedom of contract considerations that lie at the very core of the federal labor policy. In *Insurance Agents*,[44] the Labor Board found that

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[39] *Labor Board v. Lion Oil Co.*, 252 U.S. 282 (1957).

[40] *Labor Board v. Allis Chalmers Mfg. Co.*, 338 U.S. 175 (1967); *Labor Board v. Granite State Joint Board*, 409 U.S. 213 (1972); *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790 (1974).

[41] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

[42] Refusals to work voluntary overtime: *Dow Chemical Co.*, 152 NLRB 1150. Concerted rejection by production workers of optional truckdriving assignments: *Memphis Moldings, Inc.*, 164 NLRB 524. Non-unit workers' refusal to perform struck work: *Cooper Thermometer Co.*, 154 NLRB 502; *General Tire & Rubber Co.*, 190 NLRB No. 44, *enf'd*, 451 F.2d 257 (1st Cir., 1971). Refusal to cross picket lines at customer premises: *Redwing Carriers, Inc.*, 137 NLRB 1545, *enf'd*, 325 F.2d 1011 (D.C. Cir. 1963); *Overnight Transportation Co.*, 154 NLRB 1271, *enf'd*, 364 F.2d 682 (D.C. Cir., 1965); *Swain and Morris Constr. Co.*, 168 NLRB 1064.

[43] Lesnick, "Preemption Reconsidered", 72 *Col. L. Rev.* at 478, 480. "[T]he state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available. * * * *Lockridge* in effect affirms this view, which is plainly consonant with the realities of the legislative process as it has dealt with the economic weapons available to labor and management." *Id.* at 478-479.

[44] *Insurance Agents' International Union v. Labor Board*, 361 U.S. 477 (1960).

union-induced refusals to work normal hours and other concerted work interference in aid of the union's bargaining position violated § 8(b)(3) of the Act because such tactics obstructed the collective bargaining process by affording employees unfair economic advantage. This Court assumed, *arguendo*, that § 7 does not protect such partial strike tactics[45] but, reversing the Board on the point, held them permitted by the federal statute.

The premises underlying *Insurance Agents* necessarily defeat the state power exercised below. This Court reasoned that the availability of economic pressure devices is part and parcel of the process of collective bargaining to which the statute was committed and, in fact, that the very substance of the bargain is likely to turn upon the selection of economic weapons which one party can use to induce the other to come to terms.[46] Congress had not authorized the Board to "act at large in equalizing disparities of bargaining power"[47] in the name of "some new distinction of justifiable and unjustifiable, proper and abusive economic weapons"[48] or "to sit in judgment upon every economic weapon the parties to a labor contract employ" because "this amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."[49]

If such conduct cannot be barred by the agency given "primary responsibility to weigh the interest of employees in concerted activities against that of the employer in operating his

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[45] *Id.*, at 492.

[46] *Id.*, at 489.

[47] *Id.*, at 490.

[48] *Id.*, at 497.

[49] *Id.*, at 498. Accord: *American Ship Building Co. v. Labor Board*, 380 U.S. 300, 317 (1965) [post-impasse bargaining lockout] and *Labor Board v. Brown*, 380 U.S. 278, 292 (1965) [use of temporary replacements in multi-employer lockout].

business,"[30] it follows, a fortiori, that *state* courts and agencies are barred from upsetting the federal balance by interposing local standards as to allowable bargaining weapons.[31] If the expert federal agency cannot bar an employer from locking out its employees because the "proper balance to be struck between competing interests" is a "major policy decision properly made [only] by Congress,"[32] surely the federal statute must implicitly limit each of the 50 states from acting as arbiters of the sort of economic weapons the parties can use. The nexus between terms of settlement and relative economic strength of the parties is far too close to allow any arm of government but the Congress of the United States to write all or any part of the contract for the parties, directly or by limiting the "economic power realities" that set the "balance of bargaining advantage."[33] Since Congress itself "has been rather specific when it has come to outlaw particular economic weapons on the part of unions," the

[30] *Id.*, at 294-295 (Mr. Justice White, dissenting).

[31] "[I]t is strongly felt that concerted activity which serves to interfere with the employer's operations, without removing the participants from the employer's payroll is 'indefensible' . . . [H]owever, it seems a sufficient response that the employer is left free, as a matter of federal law, to discharge the culprits. No state intervention would appear to be called for * * * From [*Insurance Agents*] it would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute." Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 668-669 (1961).

[32] *Labor Board v. Brown*, 380 U.S. at 292.

[33] *Labor Board v. Burns International Security Services*, 406 U.S. 272, 288 (1972). *H. K. Porter Co. v. Labor Board*, 397 U.S. 99, 107-108. *Labor Board v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). NLRA § 8(d). "Since freedom to reject the terms proposed by the other party implies freedom to resort to economic pressures, the [federally preemptive legal] framework again necessarily includes a law of lockouts, strikes and picketing. To restrict either the objectives for which economic pressure can be applied or the forms of pressure which are permissible tips the scale toward management or union." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1353.

"admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate" must run to the states as well as the federal agency if the federal legislative will is to be effectuated.[34] In sum, converging considerations of free collective bargaining, of the uniformity implicit in the passage of a national labor law and of fidelity to the legislative process that has yielded the federal statute also compel the conclusion that Congress has enacted a comprehensive code that must be taken to have occupied the field and closed it to state regulation.

C. Since Congress rejected proposals to outlaw concerted interference with an employer's operations short of a full-fledged strike, state law may not in any event frustrate the federal determination to leave available this kind of self help weapon.

Were the fact of legislative focus not sufficiently evident from the considerations just set forth, the preemptive federal purpose with respect to the kind of conduct in question clearly emerges in the legislative history of the 1947 amendments. The bill that passed the House, H.R. 3020, defined certain "unlawful concerted activities" and made them subject to judicial enforcement by way of federal injunction and damage actions and made workers who engaged in them subject to loss of statutory rights. § 12(a)(3)(A) of the bill provided as follows:

> "Sec. 12(a) The following activities, when affecting commerce, shall be unlawful concerted activities:
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> * * * * * * * *
>
> (3) Calling, authorizing, engaging in, or assisting—(A) * * * any sit-down strike or other concerted interference

[34] *Florida Power & Light Co. v. Int. Bhd. of Electrical Workers*, 417 U.S. 790, 805, n. 16 (1974). *Labor Board v. Drivers Local Union No. 639*, 362 U.S. 274, 282-283 (1960).

with an employer's operations conducted by remaining on the employer's premises."[55]

The House Report explained that the committee had simply "written into the act" the rules that the courts had followed in denying protection under § 7 to certain types of concerted activity, claiming that the Board only "professes" to follow them, "sometimes reluctantly" doing so, but "often reinstat[ing] with back pay employees whose concerted activities are unlawful."[56] Given the reach of the language—closely resembling the state statute applied here—together with a declared purpose to outlaw those concerted activities fairly within its reach that reviewing courts[57] and at times the Board[58] had held unprotected, no feats of interpretative imagination are necessary to determine that concerted refusals to work overtime would have been encompassed as an unlawful concerted activity. Indeed, this Court has thought it "quite likely" that partial strike conduct would have been outlawed.[59]

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[55] H.R. 3020, 80th Cong., 1st Sess., § 12, reprinted at *I, Legislative History of the Labor Management Relations Act*, 1947, p. 205. See, also § 12 (b), (c) and (d) and § 7(a); *id.*, pp. 206-207, 176.

[56] H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 27-28; reprinted at *I Legisl. Hist. of LMRA*, pp. 318-319.

[57] *C. G. Conn, Ltd. v. Labor Board*, 108 F.2d 390, 397 (7th Cir., 1939) [reasoning that a worker cannot "be on a strike and at work simultaneously" in holding unprotected a concerted refusal to work mandatory overtime]. *Home Beneficial Life Ins. Co. v. Labor Board*, 159 F.2d 280 (4th Cir., 1947).

[58] Compare *Harnischfeger Corp.*, 9 NLRB 676, 685-686 [refusal to work overtime protected because a full fledged strike would have caused employer "much more serious difficulty" yet be protected] and *Cudahy Packing Co.*, 29 NLRB 837, 867-868, with *Mt. Clemens Pottery Co.*, 46 NLRB 714-715-716 [suspension for concerted refusals to work overtime held lawful because employees had insubordinately refused to work on terms prescribed by employer]. Because the Board had limited the employer to suspensions until the employees agreed to work the mandatory overtime and prohibited outright discharge, the Sixth Circuit modified the order, 147 F.2d 262. (6th Cir. 1945)

[59] *Labor Board v. Insurance Agents' Int. Union*, 361 U.S. at 499, n. 31.

But § 12 was rejected in the Conference Committee with the following explanation;

> "Under existing principles of law developed by the courts and recently applied by the Board, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in section 10(c)."[60]

Congress enacted the statute without § 12, presumably in agreement that the federal balance warranted only employer self-help to counter peaceful partial strike activity.

This history demonstrates at once the fact of legislative focus and its telling significance for preemption purposes. Because H.R. 3020 also provided for majority strike votes but the Act as passed did not, and the legislative history showed no intent to leave the states free to adopt it, this Court unanimously struck down Michigan's statute requiring secret ballot votes before striking as applied to enterprises subject to the federal statute.[61] Similarly, because Congress had rejected proposals to substitute compulsory arbitration for the right of local public utility employees to strike, this Court held that enforcement of Wisconsin's compulsory arbitration statutes against local utility employees covered by the Act "conflict[ed] with the exercise of federally protected rights."[62] In light of

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[60] H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. p. 59, reprinted at *I Legisl. Hist. of LMRA*, p. 563.

[61] *International Union, United Automobile, etc. Workers v. O'Brien*, 339 U.S. 454, 458 (1950).

[62] *Amalgamated Ass'n of Street, etc. Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383, 396 (1951).

these holdings, it seems myopic to suggest, as did the court below, that Congress can "focus upon" activity only by giving it "very comprehensive statutory treatment" (P. A-14). Instead, since the legislative history evidences Congressional rejection of proposals to outlaw concerted action closely resembling the state statute applied here on the judgment that the matter should be left to employer self-help, Wisconsin's contrary determination must yield.

This history together with the gloss put on it by this Court demonstrates also the precision and sensitivity of the accommodation of competing labor-management interests delineated in federal labor policy. The proposition that state power to restrain peaceful worker pressures short of full-fledged strike ought to run concurrently with the employer's recourse to self-help is just as unreasoned and simplistic as its necessary corollary—that state power should exist to proscribe employer bargaining tactics short of the lockout. Of course, both proposition and corollary are non-sequiturs because:

> "There is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they are willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful . . ."[63]

One important "economic consequence" that an employer must weigh before disciplining or replacing either the leaders or participants is the *protected* right of co-workers to go on strike for their reinstatement and thereby deprive the employer of his remaining production while running the risk of permanent replacement themselves.[64] In short, because Wisconsin allowed

[63] *Labor Board v. Insurance Agents*, 361 U.S. at 495.

[64] *John S. Swift Company, Inc.*, 124 NLRB 394, *enf'd on this point*, 277 F.2d 641 (7th Cir., 1960). In *Swift*, the employer discharged a number of employees who, in support of certain bargaining demands, had concertedly refused to work a mandatory assignment of overtime hours. Other employees then observed the picket lines established by the discharged workers and were, in turn, discharged. The Board held, and the Court of Appeals agreed, that the latter discharges were unlawful. "[E]mployees who go on strike to protect a lawful discharge enjoy statutory protection as economic strikers." 277 F.2d at 646.

K & T to avoid facing the economic consequences of self-help by outlawing its workers' peaceful bargaining pressures, the state has impermissibly infringed on the area of labor combat designed to be free.

D. Since this Court's divided, discredited and mischievious holding in Briggs-Stratton conflicts with the clear pattern of later preemption decisions, it should be overruled or limited to its facts.

Because the decision below materializes the *Briggs-Stratton* spectre that peaceful collective bargaining weapons may come within some excluded middle of federal labor policy and, though not prohibited by § 8 of the NLRA, be subject to state prohibition, it is time for this Court to lay the ghost. From what has already been said, it seems obvious that later holdings here have drained that early decision, voted by a bare majority of the Court, of its vitality. It has had no progeny in subseqeunt holdings. Its "approach" has been specifically repudiated by this Court on no less than three occasions.[65] Its substantive holding has been questioned several times, implicitly[66] and then

[65] See citations at p. 9, n. 11, *supra*.

[66] "Or, the Board may decide that an activity is neither protected nor prohibited, and thereby *raise the question* whether such activity may be regulated by the States." *San Diego Building Trades v. Garmon*, 359 U.S. at 245 (Emphasis added). Cf. "[s]urely that suggestion is foreclosed by [*Briggs-Stratton*]", *id.* at 253 (Mr. Justice Harlan, concurring).

expressly.[67] Again, although this Court's labor preemption opinions have rarely issued without concurrences or dissents in recent years, it seems significant that ***Briggs-Stratton*** has not been cited approvingly in any Court or separate opinions since 1959.[68] Not surprisingly, state courts have divided as to whether its holding remains authoritative.[69] And leading scholars have observed that the force of the *Briggs-Stratton* preemption holding was, in steady progression, undermined by *Garner*,[70]

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[67] "We may agree *arguendo* . . . that this Court's decision in the *Briggs-Stratton* case . . . established that the employee conduct here was not a protected concerted activity". *Labor Board v. Insurance Agents*, 361 U.S. at 492. "[*R*]*egardless of the status today* of other *substantive* rulings in the *Briggs-Stratton* case * * * [T]o view *Briggs-Stratton* as controlling on the § 8 issue would be to compound the defects of a *now discarded approach* to preemption; it would amount to saying that the Board [is] foreclosed . . . by a *decision rendered long ago* * * * *Perhaps* this element of the *Briggs-Stratton* decision [that '§ 13, unlike § 7, was not an inhibition on state power'] *has become open also.*" *Id.* at 493, n. 23 (emphasis added).

[68] See n. 66, *supra*, p. 23. By way of contrast, the vitality of *Garner-Morton* preemption approach is demonstrated by their citation in most of the recent decisions of this Court on the subject, whether or not secondary pressures were discussed. See *Beasley v. Food Fair Stores*, 416 U.S. 653, 662 (1974); *Labor Board v. Nash-Finch Co.*, 404 U.S. at 144; and *Connell Constr. Co. v. Plumbers, etc. Local No. 100*, — U.S. at —, 44 L.Ed.2d at 434.

[69] Compare *Holland Motor Express v. Michigan Employment Security Commission*, 42 Mich. App. 19, 201 N.W. 2d 308, 319 (1972) [since lockout merely permitted and not protected by NLRA, no preemption of payment of unemployment benefits on authority of *Briggs-Stratton*] and *Simpkins v. Southwestern Idaho Painters District Council No. 57*, 20 Idaho 1, 505 P.2d 313, n. 12 (1973) [*Briggs-Stratton*, "an earlier decision apparently inconsistent with *Morton*"].

[70] In 1958, Professor Paul R. Hays wrote of *Briggs-Stratton*: "But under the logic of *Garner*, it too, would be preempted, and I do not believe that any attempt to extend *Briggs-Stratton* beyond its exact facts would be successful. And this warning would apply even to conduct which has been held by the Board, much more clearly than had the conduct involved in *Briggs-Stratton*, to be unprotected, though not prohibited." Hays, "State Courts and Federal Preemption", 23 *Mo. L. Rev.* 373, 376. In early 1959, Professor Meltzer wrote that Garner is "plainly incompatible with the result and the approach in *Briggs-Stratton*. . . . Accordingly, . . . [Briggs-Stratton] appears to be a doubtful basis for state competence over unprohibited and unprotected conduct." Meltzer, "The Supreme Court, Congress and State Jurisdiction Over Labor Relations: I", 59 *Col. L. Rev.* 1, 17 (1959).

rejected in *Garmon*,[71] overruled inferentially by *Insurance Agents*[72] and felled in *Morton*.[73]

Scholars have also written that the premises underlying its analysis of "partial strike" activities and the protection of § 7 cannot be squared either with reason, with the realities of industrial relations or with other authorities.[74] For example, the claim that federal legislation allowing discharge for unprotected conduct would not preclude the lesser sanction of re-

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[71] After *Garmon*, Professor Harry Wellington questioned whether *Briggs-Stratton* was "supportable" where the work stoppages were not "associat[ed] with potential violence . . . this weightiest of state interests" and said "the answer is no (and I assume that without this association intermittent work stoppages are still, as a matter of federal law, outside the protection of Section 7." For one thing, he reasoned, to allow the state to "add its sanction to the employers could . . . upset the delicate bargaining balance established by federal law." For another, "no tribunal except the NLRB is to be trusted with expounding in the first instance the meaning of Section 7." Wellington, "Labor and the Federal System", 26 *U. of Chi. L. Rev.* 542, 550, 552.

[72] "[I]t would seem to follow a fortiori that state courts and agencies may not interject their standards of 'unjustifiable' or 'abusive' economic weapons into the context of a collective bargaining dispute". Michelman, "State Power to Govern Concerted Employee Activities", 74 *Harv. L. Rev.* 641, 669.

[73] Ratner, "New Developments in Federal State Jurisdiction", *15th Ann. NYU Conf. on Labor* 47, 54-55: Cox, *supra*, 85 *Harv. L. Rev.* at 1348, 1352; Lesnick, *supra*, 72 *Col. L. Rev.* at 474.

[74] See, e.g., Cox, "The Right to Engage in Concerted Activities", 26 *Ind. L. J.* 319, 337-340 (1951); Getman, "The Protection of Economic Pressure By Section 7", 115 *U. of Penn. L. Rev.* 1195, 1232-1240 (1967); and Schatzki, "Some Observations and Suggestions Concerning a Misnomer—'Protected' Concerted Activities", 47 *Tex. L. Rev.* 378, 379-382 (1969).

course to state legal restraints conflicts with the probable realities of relative bargaining power in the circumstances.[75] Eleven years later this Court recognized that there was "little logic" in such reasoning and expressly repudiated it.[76] The notion that the federal agency had no power to deal with partial strike activity in any manner and hence it must be "governable by the states or it is entirely ungoverned" became an obvious anachronism after the Labor Board discerned such authority in § 8(b)(3).[77] One of its most important underpinnings, that the employer seemed to lack "any kind of self-help to cope with these coercive tactics", has come completely open as federal labor policy has evolved since 1949. It is "no longer true, if it ever were true, that an employer is helpless in the face of such bargaining tactics."[78] Finally, the aphorism that it is somehow "indefensible" for employees to be on strike and at work simultaneously has either been bypassed by the evolution of

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[75] "In fact, most employers facing a union with the strength and discipline to call a series of 'quickie' strikes would lack the economic power to discharge union members, leaving legal redress the more efficient sanction." Cox, "Labor Law Preemption Revisited", 85 *Harv. L. Rev.* at 1347.

[76] *Labor Board v. Insurance Agents,* 361 U.S. at 495.

[77] Lesnick, "Preemption Reconsidered", 72 *Col. L. Rev.* at 478, n. 48.

[78] "Not only may he replace the employees involved, but he is free to lock them out or subcontract the work they have been doing", matters that were "not clear" when *Briggs-Stratton* was decided. "A bargaining lockout, in particular, would seem to be an appropriate defensive measure. . . . So long as the employer may, in effect, choose to turn the conduct into a total strike, there is no reason why it should be held unprotected because it is different than a total strike * * * [T]he Court should . . . overrule the holding in the *Briggs & Stratton* case." Getman, "Protection of Economic Pressure", 115 *U. of Penn. L. Rev.* at 1236. Professor Schatzki suggests an additional possibility which he terms the "partial lockout"; *i.e.* a reduction in wages or a decrease in some other beneficial working conditions. Schatzki, "Misnomers", 48 *Tex. L. Rev.* at 382.

employer defenses or, as sheer rhetoric, begs the relevant questions.[79]

In any event, if not to be overruled, *Briggs-Stratton* is plainly distinguishable on its facts from the conduct in question here. There, the work stoppages were intermittent, irregular and unannounced; conducted for unstated purposes during normal working hours; and they crippled the employer from meeting production or delivery schedules. Here, K & T employees worked their regular work day performing their normal duties; their rejection of overtime was not intermittent and quite predictable; and K & T could and did plan production accordingly. Here, the employer was never in the dark as to the employees' purpose. The concerted action was, at first, a measured protest of the announced unilateral increases in work schedules and corresponding reductions in overtime rates. Later, the pressure continued to resolve the issues still at impasse in the drawn-out negotiations. Finally, in *Briggs-Stratton*, this Court could compare the 26 intermittent work stoppages over a four month period to worker takeover of the plant, a sequence of "sit-down strikes". Here, in contrast, the employees were merely exercising their customary right to reject overtime and leave at shift's end, conduct so unobjectionable that K & T conceded it would be "hard-pressed" even to discipline anyone for his participation (A. 38-39).

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[79] Compare *Edir, Inc.*, 159 NLRB 686 [picketing of employer's restaurant during off-duty hours held protected] and cases cited, *supra,* at p. 16, n. 42. No substantial distinction can be drawn between the "partial strike" conduct in these illustrations of protected activity and concerted refusals to work mandatory overtime, either in terms of disloyalty, insubordination, pay only for work performed, the-less-than-absolute worker interests that may give rise to it, or impact on the employer's business.

II. Since Concerted Exercise of a Right to Reject Overtime Is Protected From Employer Interference by § 7 of the NLRA, It May Not Be Prohibited by the State.

So far, our argument has proceeded on the premise that the conduct in question is merely permitted by the federal statute. We now show that § 7 of the Act protects concerted exercise of a right to reject overtime and hence, under classic preemption doctrine, no state may restrain the exercise of a right secured by the federal statute.[80]

In *Dow Chemical Co.*, 152 NLRB 1150, weekend overtime work was voluntary *i.e.*, employees were asked beforehand whether they wanted weekend work and were free to decline it. After the company announced that such overtime assignments would become mandatory several weeks later, a group of employees resolved to and did in fact engage in concerted refusals to work overtime shifts before the change was to take effect for the purpose of exerting pressure on the company to forego the change. The Board concluded that the discharge of an employee for having led and participated in the concerted refusals to work violated § 8(a)(1). Distinguishing prior cases where employees had in effect been insubordinate in their collective refusals to work required overtime assignments, it held participation in and leadership of these concerted refusals to be protected by § 7 because the acceptance of this overtime work was voluntary.[81]

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[80] See, e.g., *Hill v. Florida*, 325 U.S. 538 (1945). *International Union, United Automobile, etc. Workers v. O'Brien*, 339 U.S. 454 (1950).

[81] Since overtime work was optional, "the employer had already agreed to permit employees to decide for themselves whether they wished to work weekends * * * [and thus in concertedly rejecting the work the employees did not seek] to impose on their employer their own condition of employment." 152 NLRB at 1152.

Notwithstanding the Board's evident distinction between conduct amounting to insubordination and group exercise of a right to reject, the court below would build a fortress on the procedural fortuity that Dow employees had concertedly refused to "volunteer" for the scheduled work whereas K & T employees had concertedly exercised their options to reject it (P. A-12). Aside from the patent insubstantiality of the purported distinction in terms of any values secured by the Act, the court completely ignored a Board decision rejecting just such a claim. *Memphis Moldings, Inc.*, 164 NLRB 524.[82]

Finally, the court below incorrectly believed the Board's divided decision in *Prince Lithograph*[83] to hold that union-induced, concerted refusals to work scheduled or requested overtime are unprotected even if that overtime is voluntary, chiefly because, in a confused dictum, the administrative law judge had at first analogized a concerted refusal to work voluntary overtime for a *secondary* object[84] with the *primary* conduct he now faced.[85] The decision below ignores the fact that the administrative judge went on to hold that the Prince employees

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[82] Three plant employees also drove truck for the employer but had the option of rejecting a particular truckdriving assignment to continue working in the plant. When all the drivers exercised their option to *reject* such assignments in order to pressure the employer to negotiate a higher mileage rate with their union for such work, they were dismissed. Applying *Dow*, the Board found that the concerted refusals were protected by § 7. "As Respondent made the acceptance of such an assignment optional or voluntary, the drivers were not seeking to impose on their employer their own conditions of employment to perform such work." 164 NLRB at 527.

[83] *Prince Lithograph Co., Inc.*, 205 NLRB 110.

[84] *Id.*, at 115.

[85] Significantly, perhaps, the same administrative judge who decided *Prince Lithograph* had been *reversed* by the Board when he recommended dismissal of the complaint in the earlier case. That the strike activity was otherwise protected, the Board held, was no defense to a secondary boycott complaint. *Iowa Beef Packers, Inc.*, 188 NLRB 5, 6.

who had concertedly refused to work voluntary overtime did *not* "engage in unprotected activity" but that Prince nevertheless

> "had the right to replace [the employee] as it had the right to replace any other striker for refusing to work."[86]

In other words, not even the administrative judge's decision in *Prince* stands for the proposition relied upon below.

Most assuredly, the Board in *Prince* approved only the administrative judge's holding. It reasoned:

> "[W]e think the more realistic view to be that Respondent was *merely replacing* an employee who engaged, at the instance of the Union, in a partial strike by participating in a concerted refusal to work overtime. Such activity, as the Administrative Law Judge below found, gives rise to a *counter-vailing right* of the Employer to utilize replacements in order that necessary work may be performed."[87]

This holding, of course, *presupposes* that the conduct was protected, since a "countervailing right . . . to utilize replacements" has long been an employer prerogative when faced with uncontrovertibly protected activity such as a full fledged strike or a refusal to cross picket lines.[88]

In short, since the activity here seems squarely within the protection of § 7 as interpreted by the Board, the exertion of state power to forbid it must be struck down as in conflict with the Constitution of the United States.

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[86] *Prince Lithograph Co., Inc.*, 205 NLRB at 115.

[87] *Id.*, at 110, n. 2 (emphasis added).

[88] *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *Teamsters Local 79 v. Labor Board*, 325 F. 2d 1011 (D.C. Cir., 1963).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

National Labor Relations Act, as Amended (61 Stat. 316, 29 U.S.C. § 141, et seq.)

Section 2. "When used in this subchapter

* * * * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

* * * * * * *

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a).

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exerise of the rights guaranteed in Section 7."

Section 8(b).

"It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * *."

Section 10.

"(a) The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by * * * law."

* * * * * * * *

Section 13.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 501.

"When used in this act—

* * * * * * * *

(2) The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

Wisconsin Statutes

Sec. 111.06.

(2) "It shall be an unfair labor practice for an employee individually or in concert with others:

* * * * * * * *

(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF FOR RESPONDENT WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OPINIONS BELOW

The opinion of the Wisconsin supreme court is reported at 67 Wis. 2d 13, 226 N.W. 2d 203, and printed in the petition for writ of certiorari here (P. A-2ff)./[1] The opinion of the Milwaukee circuit

/[1]Following appellants' style, references to pages of the petition will be indicated "P.A. —." Pages in the single appendix will be referenced "A."

court is reported at 88 LRRM 2920, and is printed at P. A-15ff. The decision of the Wisconsin Employment Relations Commission is unreported but is printed here at P. A-22ff.

JURISDICTION

The Attorney General agrees with appellants that jurisdiction is here and has been invoked timely.

QUESTION PRESENTED FOR REVIEW

Is state regulation of union induced concerted refusals to work scheduled overtime pre-empted by the National Labor Relations Act?

STATEMENT OF THE CASE

Kearney & Trecker Corporation (employer) was party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10). The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, although it was executed on August 9, 1972, and contained an expiration date of July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wished to have a 40-hour week with a time-and-a-half pay rate for work over 8 hours in a day and 40 hours in a week. The union wished to retain the prior schedule of 37 ½ hours a week with overtime rates applicable for work over 7½ hours a day and 37 ½ hours in a week.

On March 1, 1972, the employer announced that it was implementing its 40-hour-week proposal effective March 12. On March 7 the union membership authorized a strike, and further resolved that no union member would work overtime, overtime being defined as work in excess of 7 ½ hours a day or 37 ½ hours a week (A. 19-20, 40). Despite its March 1 announcement, the employer did not implement its 40-hour week proposal on March 12 or any time thereafter.

On March 16 the union "remind[ed]" its members that even though negotiations were still underway the "policies" voted on by membership "WILL continue in effect until" a new labor agreement was signed (Ex. 13 (R. 80, 160; A. 26-27)).

Prior to March 7 only five percent of the employes declined overtime work opportunities (A. 22). As many as 354 worked on Saturday, March 4 (Ex. 1 (R. 86, 89, 139-140; A. 30, 33, 51)). From March 11, 1972, until the hearing in July, 1972, no employes worked overtime, with the exception of three employes who worked on May 13, even though the company continued to schedule overtime during this period (A. 26, 28-29, 32). The employer lost control of production as a result (A. 41-46).

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act, 29 U.S.C. sec. 141 *et seq.* (A. 47).

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union and District 10 violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S.C. sec. 158 (b) (3), by requiring the employes not to work overtime. On June 27, 1972, the NLRB Regional Director refused to issue a complaint on the ground that the union's conduct was not prohibited by the National Labor Relations Act. The Regional Director added (A. 53):

> "*** Dismissal by this Agency does not necessarily preclude the Charging Party [i.e., the employer] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). On February 26, 1973, a commission examiner found that the union, but not District 10, had authorized, encouraged and condoned the employes' concerted refusal to work overtime, that the design and effect was to interfere with the employer's production, and that the union had therefore violated sec. 111.06 (2) (h), Wis. Stats., which prohibits a concerted effort to interfere with production except in the case of strikes. The examiner

ordered the union to cease and desist from so authorizing, encouraging and condoning and to take certain other affirmative action (P. A-34, 35). The union's federal pre-emption argument was rejected (P. A-44-48). The commission adopted the examiner's findings, conclusions and order as its own on April 23, 1973 (P. A-23).

The union petitioned the Milwaukee circuit court for review. The commission counter-petitioned for enforcement. Employer intervened. On August 24, 1973, the circuit court entered its memorandum decision rejecting union's federal pre-emption argument (P. A-15-21), and on August 29, 1973, entered its judgment affirming and enforcing the commission's order.

The union appealed to the Wisconsin supreme court. The Wisconsin court unanimously affirmed the Milwaukee circuit court and also rejected the union's federal pre-emption argument (P. A-2-14). The union's motion for rehearing was denied without opinion on May 6, 1975 (P. A-1).

SUMMARY OF ARGUMENT

A concerted refusal to work scheduled overtime is not protected and is not prohibited by the National Labor Relations Act. The concerted refusals here clearly are distinguishable from cases where the Board found protected concerted refusals to volunteer for overtime work on a single weekend. Here, the practice was for the employer to schedule overtime and to permit employes to decline it for reasons acceptable to a supervisor. The employes declined virtually all overtime for over four months.

This distinction makes an important difference and has been made by the Board. For concerted refusals to work scheduled overtime are unprotected because such conduct is inconsistent with a genuine strike and would dictate the employes' own terms of employment. Neither reason is implicated by a refusal to volunteer.

Generally, states may regulate conduct neither protected nor prohibited by the Act. An exception obtains where congress has focused on the particular conduct comprehensively and with particularity and declined to regulate. There has been no such focus here.

These refusals come within the area of coercive and injurious conduct which congress designedly left for the states to regulate. They are governable by the states or are left ungoverned.

The fact that concerted refusals to work overtime are otherwise peaceful and economically motivated does not itself deprive states of jurisdiction. Congress seeks labor peace, not economic warfare. States are excluded from regulating peaceful, economic weaponry only where the same is protected, prohibited or has been the subject of close congressional focus and left permitted.

Legislative history shows no congressional intent to have such concerted refusals be free of all regulation.

ARGUMENT

State Regulation Of Union Induced Concerted Refusals To Work Scheduled Overtime Is Not Pre-empted By The National Labor Relations Act.

A. The Act neither protects nor prohibits such conduct.

The *Garmon*[2] test for federal pre-emption is whether the conduct in question arguably is protected by sec. 7 or prohibited

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[2] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959).

by sec. 8 of the National Labor Relations Act, 29 U.S.C. §§141 *et seq.*, hereafter the "Act."/3

The union does not contend that its conduct is prohibited by the Act. The NLRB's Regional Director determined that it was not prohibited./4 He relied on *NLRB v. Insurance Agents' Union*/5 where this court held not prohibited similar partial strike activity consisting in refusals to solicit business, reporting in late, refusing to perform customary duties, "doing what comes naturally," leaving at noon as a group, and similar "harassing tactics."/6 The Director's determination "illuminated by explanations,"/7 as well as *Insurance Agents'* itself, disposes of any argument that the union conduct is prohibited.

Clear precedent shows the union's conduct is not protected./8 In *Valley City Furniture*/9 a union induced employes to refuse scheduled overtime in response to the employer's unilaterally setting working conditions. The Board held the conduct unprotected because it brought about a

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/3*Garmon* itself gave two formulations: (1) "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 ... or constitute an unfair labor practice under §8 ... state jurisdiction must yield," 359 U.S. at 244; and (2) "When an activity is arguably subject to §7 or §8 of the Act, the States ... must defer to the exclusive competence of the [NLRB]. ..." *Id.*, at 245.

/4A. 52-54.

/5361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

/6*Id.*, 361 U.S. at 480-481.

/7*Cf. Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 192, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965).

/8Although the union emphasizes that the concerted refusal was a decision of the membership, it nowhere faults the finding (P. A-33) of union inducement.

/9110 NLRB No. 216, 35 LRRM 1265, 1266 (1954).

"condition that would be neither strike nor work"; the union was attempting to "dictate the terms and conditions of employment." In *Polytech, Inc.*/10 the Board explained its reasoning:

> "[A] concerted refusal to work overtime was unprotected [because] when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay. The principle ... is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do."

The Eighth Circuit has fashioned this test:/11

> "The test in each case is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime."

The Seventh Circuit is in accord,/12 and this court cited it approvingly in *Briggs-Stratton.*/13

/10195 NLRB No. 126, 79 LRRM 1474, 1475, 1972 CCH NLRB par. 23, 952 (1972).

/11*First National Bank of Omaha v. N.L.R.B.*, 413 F. 2d 921, 925 (8th Cir. 1969).

/12*C.G. Conn., Limited v. National Labor Relations Board*, 108 F. 2d 390, 397 (7th Cir. 1939); *N.L.R.B. v. Kohler*, 220 F. 2d 3, 11 (7th Cir. 1955).

/13*International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 257, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

The union's reliance on *Dow Chemical*/[14] is misplaced. There the practice was for employes wishing to volunteer for weekend work to so indicate. By "refusing to volunteer"/[15] on a single weekend the employes did not seek to impose their own working conditions on the employer, and their refusal was protected.

Dow, therefore, is inapposite for three reasons: (1) it was not union induced, as here;/[16] (2) the Board's ruling concerned the single weekend refusal, and here the refusal lasted over four months;/[17] and (3) the employes refused to volunteer for work whereas here the employes refused scheduled overtime assignments.

Dow expressly distinguished the *Valley Furniture* line of cases where the refusal to work scheduled overtime was unprotected./[18] The union denigrates this distinction in *Dow* itself. In fact, the distinction between failing to volunteer and refusing to work scheduled overtime goes to the heart of the rationales for the rule that a concerted refusal to work scheduled

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/[14]152 NLRB No. 122, 59 LRRM 1279, 1965 CCH NLRB par. 9,390 (1965).

/[15]*Id.*, 59 LRRM at 1281. The union incorrectly says (brief, p. 28) the employes there were free to decline overtime. See *Dow*, n. 3.

/[16]There is a tendency to extend greater protection to nonunion induced conduct. See *Polytech, supra*, where the Board emphasized that the employes were unrepresented and had no grievance procedure. Accord: *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 82 S.Ct. 1099, 8 L.Ed. 2d 298 (1962).

/[17]The Board excepts from its general ban single-refusal conduct as opposed to continuous refusals over a period of time. See *First National Bank of Omaha*, 171 NLRB No. 152, 69 LRRM 1103, 1105, 1968-1 CCH NLRB par. 22,551 (1968), *enforced*, 413 F. 2d 921 (8th Cir. 1969).

/[18]*Dow*, 59 LRRM at 1281.

overtime is unprotected. The rationales are that the latter type is inconsistent with a genuine strike or genuine performance of the work normally expected of employes and consists in union dictation of the workers' terms of employment. A failure to volunteer implicates neither rationale.

Similarly, *Memphis Moldings, Inc.*/[19] does not help the union. An employer, after specifically agreeing with employes that they need not take a truck driving assignment, discharged them for exercising their rights under that agreement. Thus, *Memphis* had nothing to do with refusals to perform regularly scheduled work which is part and parcel of the normal work routine, and simply followed the established rule which protects the exercise of rights under collective agreements./[20]

Thus, far from *Dow* and *Memphis Moldings*, the employer here had every right to expect overtime work, i.e., that the employes collectively would "perform all of the work they were hired to do."/[21] The expired labor agreement reposed scheduling and directing the work force in management./[22] An addendum thereto provided that "when overtime is necessary a job has become critical and nothing can stand in the way of its completion."/[23] Although individuals enjoyed an option to

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/[19]164 NLRB No. 74, 65 LRRM 1108, 1967 CCH NLRB par. 21,239 (1967).

/[20]See *Roadway Express, Inc.*, 217 NLRB No. 49, 88 LRRM 1503, 1505, 1974-75 CCH NLRB par. 15,626 (1975), holding unlawful the discharge of a truck driver who refused to drive an unsafe truck where the contract provided that a driver could refuse to drive an unsafe vehicle.

/[21]*Cf. Polytech, Inc., supra*, note 10.

/[22]Jt. Ex. 1, R. 138, sec. 203, A. 50. Received, R. 59, A. 17.

/[23]A. 50-51.

decline overtime, acceptance of the reasons for declining was up to the supervisors./[24] Compare *John S. Swift Company, Inc.*,/[25] where a concerted refusal to work overtime was unprotected in the case of employes who had previously worked overtime when requested in the absence of a valid personal excuse. Here, there had been only a five percent refusal prior to the overtime ban./[26]

In any event, the Board has since ruled that a concerted refusal to work scheduled overtime is unprotected even if secured by a voluntary right to refuse overtime. *Prince Lithograph Co.*/[27] There, the union had induced a concerted refusal to work overtime. The labor agreement had permitted the right to refuse overtime. The administrative law judge, noting that the Board had held a secondary refusal to work voluntary overtime to be unlawful, held that the union induced refusal was unprotected despite the individual voluntary right to refuse./[28] The Board affirmed.

The union would distinguish *Prince* because the ultimate finding was that the refusal was "not unprotected."/[29] That ultimate finding turned on facts peculiar to that case, namely, a contractual right that overtime could be refused by "any and

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/[24]A. 24.

/[25]124 NLRB No. 46, 44 LRRM 1388, 1390 (1959), *enforced*, 277 F. 2d 641 (7th Cir. 1960).

/[26]A. 22.

/[27]205 NLRB No. 23, 83 LRRM 1654, 1973 CCH NLRB par. 25,614 (1973).

/[28]"If an overtime strike, protected by a voluntary right to refuse overtime, for an unlawful object constitutes a violation ... [then] ... an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision." *Id.*, at 115.

/[29]*Id.*, at 115.

all."/[30] The union's contention that the Board did not adopt the examiner's rationale conflicts with the Board's contrary language./[31] The brief *amicus curiae* on behalf of the Board tucks *Prince* away in a footnote/[32] without denying its holding that the right of an individual to refuse an overtime assignment does not make a concerted refusal protected.

B. The concerted refusals do not come within the area congress designed to be free of all regulation.

These concerted refusals do not come within an area congress wants to be free of all regulation because congress did not focus on this conduct and treat it comprehensively and with particularity.

The primary test for pre-emption is the protected-prohibited test. The early cases used it./[33] *Garmon* refined it./[34] Its basis was avoidance of "threatened interference with the clearly

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/[30]*Id.*

/[31]The Board said it had decided to "affirm the rulings, findings, and conclusions ... and to adopt his recommended Order." *Id.*, at 110. In addition, in note 2, the Board accepted "the reasons given" by the judge.

/[32]Brief, p. 5, n. 4.

/[33]Wisconsin could enjoin mass picketing and like conduct because no employe was "deprived of rights protected" by the Act. *Allen-Bradley Local 1111, etc. Electrical Workers v. Wisconsin E.R. Board*, 315 U.S. 740, 751, 62 S.Ct. 820, 86 L.Ed. 1154 (1942). Florida, however, could not license union business agents because the Act "protect[s]" employes' right to choose their agent. *Hill v. Florida*, 325 U.S. 538, 541, 65 S.Ct. 1373, 89 L.Ed. 1782 (1945). Wisconsin interfered with the exercise of rights "protected by sec. 7" in enjoining a strike by public utility

indicated policy of industrial relations" and the "potential frustration of national purposes" from state action./[35] Twelve years later *Lockridge*/[36] reaffirmed it and noted that a "heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon*,"/[37] because "the federal system dictates that this problem be solved with a rule capable of relatively easy application so that lower courts may largely police themselves."/[38]

Despite its primacy, the protected-prohibited test is not exhaustive./[39] States, for example, may act in matters of genuine local concern, such as violence, even if the violence also is prohibited by the Act./[40] Conversely, states may not act, even if the conduct is neither protected nor prohibited, where congress' occupation of the area by comprehensive regulation shows an intent that the conduct be free of all regulation.

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employes. *Amalgamated Ass'n. of Street Etc. Employees v. Wisconsin E.R. Board (Street Employees)*, 340 U.S. 383, 398, 71 S.Ct. 359, 95 L.Ed. 364 (1951). Wisconsin could, however, enjoin "quickie," or intermittent, strikes which were neither "a right under federal law or a violation of it." *International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 265, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

/[34]See note 2, *supra*.

/[35]*Garmon*, 359 U.S. at 243, 244.

/[36]*Amalgamated Ass'n of Street etc. Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120.

/[37]*Id.*, 403 U.S. at 302.

/[38]*Id.*, at 290.

Morton[41] is the paradigm of this narrow, singularly unique exception to the protected-prohibited test. There, a union's strike aimed to persuade employes of a neutral employer to cease work was unlawful secondary activity. This union also had appealed to a neutral employer directly, rather than through his employes. This latter activity was not unlawful under the Act. Nevertheless, the district court awarded damages under state secondary boycott law. This court reversed even on the assumption that the conduct was neither protected nor prohibited. For congress had considered what conduct could be made the subject of a private damage action "comprehensively and with great particularity,"/[42] and the application of state law to proscribe the "same type of conduct which Congress focused upon but did not proscribe" would "frustrate the congressional determination to leave this weapon of self-help available."/[43]

/[39]*Garmon* said the NLRB might decide that an activity is neither protected nor prohibited and thereby "raise the question" whether the states may act. *Id.*, 359 U.S. at 245. *Briggs-Stratton* noted that the quickie strike was neither a right under nor a violation of the Act, "nor was it legalized." *Id.*, 336 U.S. at 265. Other exceptions, not material here, empower the states to enforce federal contract rights even as to conduct protected or prohibited under the Act. See *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 94 S.Ct. 2069, 2072, 40 L.Ed. 2d 620 (1974).

/[40]*International Union, Etc. v. Russell*, 356 U.S. 634, 641, 78 S.Ct. 932, 2 L.Ed. 2d 1030 (1958), *reh. denied*, 357 U.S. 944, 78 S.Ct. 1379, 2 L.Ed. 2d 1558.

/[41]*Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964).

/[42]*Id.*, 377 U.S. at 258.

/[43]*Id.*, at 259-260.

Here, congress has not focused upon concerted refusals to work overtime with comprehensiveness and particularity as in *Morton*. In fact, such refusals are outside the domain of the Act. They are "part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them."/[44] The employes remove themselves from the Act's domain. For by such stoppages "they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay."/[45]

The union nevertheless would find such congressional focus from clearly distinguishable cases like *Dow Chemical*,/[46] where a refusal to volunteer for overtime assignments is protected, and from the protected status of protesting a lawful discharge for refusing to work overtime./[47] This court's holdings on pre-emption, however, have not precluded states from recognizing the differences in situations. In fact, this court's holdings require state courts to make nice distinctions. For example, *Gonzales*/[48] sustained California's damage award to a union member wrongfully expelled from membership, but *Lockridge*/[49] struck

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/[44] *Polytech, Inc.*, 195 NLRB No. 126, 79 LRRM 1474, 1476, 1972 CCH NLRB par. 23,952 (1972). Also see discussion, *supra*, pp. 8-9.

/[45] *Id.* at 1475.

/[46] 152 NLRB No. 122, 59 LRRM 1279, 1965 CCH NLRB par. 9,390 (1965).

/[47] See *N.L.R.B. v. John S. Swift Company*, 277 F. 2d 641, 646 (7th Cir. 1960).

/[48] *International Asso. Machinists v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (1958).

/[49] *Amalgamated Ass'n. of Street etc. Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120.

Idaho's award to a union member for expulsion because of a tie-in with construing a union security clause. *Gonzales* was said to involved "tangential and remote" federal principles whereas in *Lockridge* federal concern was "pervasive and its regulation complex."/[50] On the other hand, both *Morton*/[51] and *Hanna Mining*/[52] implicated secondary boycott law. State jurisdiction obtained in *Hanna Mining*, an attempt to organize supervisors, "even if" secondary violations were present,/[53] whereas in *Morton* the states were ousted because the secondary pressure did not come within the ban of the Act, and the conduct there occurred in the context of the traditional strike by employes, "a sphere in which the federal interest is especially pervasive."/[54]

In contrast, it is easy to see that the state has jurisdiction because the concerted refusal to work overtime "finds itself at that far corner of labor law where ... federal occupation is at a minimum."/[55] Indeed, *Briggs-Stratton* holds such refusals to be "comparable" to the quickie strike, which, it is settled, the state can regulate./[56]

/[50] *Id.*, 403 U.S. at 296.

/[51] *Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 2d 280 (1964).

/[52] *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965).

/[53] *Id.*, 382 U.S. at 192-193.

/[54] *Id.*, at 193, n. 14.

/[55] *Id.*

/[56] 336 U.S. at 257.

C. *These concerted refusals come within the area of coercive conduct which congress left for the states.*

Wisconsin has jurisdiction over the instant concerted refusals to work overtime because they constitute coercive and injurious conduct which congress designedly left to the states.

Briggs-Stratton held that the quickie strike was within the area "Congress designedly left" for the states./[57] "Policing of such conduct is left wholly to the states."/[58] The court rejected the union's argument that such conduct was a protected strike, noting that to define the right to strike to include the quickie strike would legalize "the slowdown and perhaps the sit-down strike as well."[59] *Garner*, ousting states from jurisdiction over areas congress had occupied by providing a centralized agency to deal with the problem, explained:/[60]

> "This is not an instance of injurious conduct which the [NLRB] is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. [Briggs-Stratton.]"

As seen, this is a case in which the NLRB has no power to act./[61]

/[57] *International Union, U.A.W. v. Wisconsin Employment Rel. Board (Briggs - Stratton)*, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121.

/[58] *Id.*, 336 U.S. at 253.

/[59] *Id.*, at 264.

/[60] *Garner v. Teamsters Union No. 776*, 346 U.S. 485, 488, 74 S.Ct. 161, 98 L.Ed. 228 (1953).

/[61] See discussion, *supra*, pp. 7-13.

The concerted refusal here is the untraditional method of coercion congress meant to leave to the states. In *O'Brien*/[62] this court explained that *Briggs-Stratton* "was not concerned with a traditional, peaceful strike for higher wages." Rather, the conduct was " 'coercive,' similar to the sit-down strike ... and to the labor violence. ..."/[63] Similarly, the overtime strike is not the "traditional, peaceful strike for higher wages" which federal law secures. Rather, it is "inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer."/[64] Therefore, it falls outside the area congress meant to insulate from local regulation and comes within those tactics where "Policing of such conduct is left wholly to the states."/[65]

The union's attempt to distinguish *Briggs-Stratton* on its facts must fail. There, the intermittent work stoppages crippled the employer much like a sit-down strike. Here, the overtime refusals had the same effect without workers assuming the status of strikers. The union emphasizes that the workers' goal was known and predictable./[66] That hardly distinguishes state power under *Briggs-Stratton*, however. Otherwise, an armed seizure of a plant, publicly announced, would be beyond state control.

/[62] *International Union, Etc. v. O'Brien*, 339 U.S. 454, 70 S.Ct. 781, 94 L.Ed. 978 (1950).

/[63] *Id.*, 339 U.S. at 459.

/[64] *Polytech, Inc.*, 195 NLRB No. 126, 79 LRRM 1474, 1972 CCH NLRB par. 23,952 (1972). See discussion, *supra*, p. 16.

/[65] *Briggs-Stratton*, 336 U.S. at 253.

/[66] Brief, p. 27.

Briggs-Stratton's basic principles have remained largely intact over the years. Although its "approach" has been questioned,/[67] this court has relied on it to say the federal government is not in the business of "policing the orderly conduct of strikes."/[68] Its statement that " 'Congress designedly left open an area for state control' "/[69] in *Lockridge* became: "We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, *much of this is left to the States.*"/[70] Its general proposition that pre-emption is tested by whether the conduct is protected, prohibited or legalized/[71] is the law today./[72] Its guidepost as to whether state action would interfere with congressional policy/[73] continues to be this court's ultimate guidepost./[74]

/[67]"The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." *Garmon*, 359 U.S. at 245, n. 4.

/[68] *United States v. Enmons*, 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed. 2d 379 (1973).

/[69] *Briggs-Stratton*, 336 U.S. at 253.

/[70] *Lockridge*, 403 U.S. at 289. (Emphasis added.)

/[71] 336 U.S. at 265.

/[72] See discussion, *supra*, pp. 14-15.

/[73] *Briggs-Stratton*, 336 U.S. at 256-258.

/[74]"We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner*, 346 U.S. at 488. "The answer ... ultimately depends upon whether the application of state law ... would operate to frustrate the purpose of the federal legislation." *Morton*, 377 U.S. at 258. "[*Hanna Mining*] accordingly held that the Wisconsin antipicketing statutes — that furthered, not hindered, the Act's — limitations, could be applied to activity by a union of supervisors." *Beasely v. Food Fair of North Carolina*, 416 U.S. 653, 657, 94 S.Ct. 2023, 2026, 40 L.Ed. 2d 443 (1974).

D. Such concerted refusals are not beyond the power of the state to regulate solely because they are economically motivated.

Despite the controlling force of *Briggs-Stratton* the union contends congress desires concerted refusals to work scheduled overtime to be free of any regulation as constituting peaceful, economic warfare. The employer may discharge everyone. The union may strike in return. The employer then could hire strike breakers. This, the union says, is the way congress wants it. The states may not tinker with this delicate economic balance of power.

To be sure, congress left much to the "free play of economic forces."/[75] Such weaponry is " part and parcel of the system,"/[76] and congress has been "rather specific when it comes to outlaw particular economic weapons on the part of unions."/[77]

These principles deny state jurisdiction, however, only where federal occupation of the area is evident from comprehensive regulation of the field/[78] as where congress has "taken in hand this particular type of controversy"/[79] by providing a "detailed prescription of a procedure."/[80] In *Morton* it was in the context of disallowing appeals to employes but allowing them to employers that this court said:/[81]

/[75] *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971).

/[76] *Insurance Agents'*, 361 U.S. at 489.

/[77] *Id.*, 361 U.S. at 498.

/[78] See discussion, *supra*, p. 15.

/[79] *Garner*, 346 U.S. at 488.

/[80] *Id.*, 346 U.S. at 499.

/[81] *Morton*, 377 U.S. at 259.

". . . Allowing its use is a part of the balance struck by Congress between the conflicting interests. . . ."

There has been no such occupation here./[82] Further, *Garner* makes clear that these principles do not oust states from the *Briggs-Stratton* type of coercive or injurious conduct regulable by the states or not at all./[83]

The union's premise that congress wants labor controversies to be settled by unregulable economic weaponry, so long as it is peaceful, is mistaken. Economic warfare is not the congressional goal. "The underlying purpose of this statute is industrial peace."/[84] Congress aims to protect commerce/[85] by securing labor peace./[86] Collective bargaining and concerted

/[82]See discussion, *supra*, p. 16.

/[83]See discussion, *supra*, p. 18.

/[84]*Brooks v. NLRB*, 348 U.S. 96, 103, 75 S.Ct. 176, 99 L.Ed. 125 (1954).

/[85]29 U.S.C. §151, sec. 1 of the Act, provides: "*** It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

/[86]29 U.S.C. §171, sec. 201 of the Act as amended, provides that: "It is the policy of the United States that — (a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining...."

activity under the Act serve this end./[87] The choice of weaponry "is not unrestricted. *** [N]ot all forms of economically motivated strikes are protected or even permissible."/[88] Thus, secondary boycott law/[89] outlaws much peaceful, economic weaponry./[90] Peaceful, economic pressures to induce work assignments are banned./[91] Certain picketing for recognition is curtailed./[92] Strikes in violation of contractual no-strike obligations are unprotected/[93] and can be enjoined./[94]

Thus, peaceful, economic weaponry is not talismanic. Before this court has ousted states of jurisdiction it first has ascertained that congress has occupied the area of the particular conduct in question./[95] Where congress has not occupied the area the states have been free to regulate the economic weaponry./[96] Here, the Wisconsin supreme court asserted state power over the narrow area of concerted overtime refusals only after correctly concluding that such conduct is not protected, not prohibited and not the subject of a congressional design to be free of all rule.

/[87]". . .[T]he dual purpose of the Act [is] (1) to protect the right of employees to be free to take concerted action ... and (2) to substitute collective bargaining for economic warfare in securing satisfactory wages, hours of work and employment conditions." *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 284, 76 S.Ct. 349, 100 L.Ed. 309 (1956), *reh. denied*, 351 U.S. 980, 76 S.Ct. 1043, 100 L.Ed. 1495.

/[88]*American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 338, 85 S.Ct. 955, 13 L.Ed. 2d 855 (1965), (Goldberg, J., concurring).

/[89]Sec. 8 (b) (4) (B) of the Act, 29 U.S.C. §158 (b) (4) (B).

/[90]This court described the policies of the secondary boycott law in *N.L.R.B. v. Denver Bldg. & Constr. T. Council*, 341 U.S. 675, 692, 71 S.Ct. 943, 95 L.Ed. 1284 (1951), as follows: ". . . the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

The union's reliance on *Insurance Agents'*/[97] as denying state action over similar union harassment is misplaced. The question there was whether the NLRB could hold such tactics to be a violation of the union's duty to bargain in good faith./[98] This court said no because the use of such pressure itself "is not at all inconsistent with the duty of bargaining in good faith."/[99] Such duty simply was not the vessel by which the Board could "distinguish among various economic pressure tactics."/[100] Left untouched were the *Briggs-Stratton* holdings that "Policing of such conduct is left wholly to the states,"/[101] and, as stated in *Garner*, and left unaddressed in *Insurance Agents'*,/[102] that states may regulate injurious or coercive conduct with either is governable by the states or is ungoverned./[103]

The union's reliance on principles of freedom of contract also is misplaced. For those principles only exclude government from dictating contract terms which the parties must agree to./[104]

/[91]29 U.S.C. §158 (b) (4) (D), which is sec. 8 (b) (4) (D) of the Act. In *NLRB v. Plasterers' Local Union*, 404 U.S. 116, 123, 92 S.Ct. 360, 30 L.Ed. 2d 312 (1971), this court said: "Section 8 (b) (4) (D) makes it an unfair labor practice for a labor organization to strike or threaten to coerce an employer or other person in order to force or require an employer to assign particular work to one group of employees rather than to another, unless the employer is refusing to honor a representation order of the Board." This court noted: "It is clear that Congress intended to protect employers and the public from the detrimental economic impact of 'indefensible' jurisdictional strikes." Ibid., 404 U.S. at 130.

/[92]29 U.S.C. §158 (b) (7), which is sec. 8 (b) (7) of the Act.

/[93]*Atlantic Richfield Co.*, 199 NLRB No. 135, 81 LRRM 1412, 1973 CCH NLRB par. 24,763 (1972).

/[94]*Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed. 2d 199 (1970).

E. Legislative history does not support an implied exclusion of state regulation of concerted refusals to work scheduled overtime.

The union's recitation of legislative history itself shows that the congressional proposal to ban sit-down strikes or other such concerted interferences was borne of concern that the NLRB had lost sight of congressional antipathy to such conduct./[105] The House report noted that the Board had recently mended its ways, but sceptically suggested the change was inspired "by the public demand."/[106] The conference committee put more stock in the Board's recent decisions./[107]

/[95]In *Morton* this court said: "But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303 'Congress occupied this field and closed it to state regulation.'" *Id.*, 377 U.S. at 258. In *Garner* this court said: "Congress has taken in hand this particular type of controversy." *Id.*, 346 U.S. at 488.

/[96]In addition to *Briggs-Stratton* see *Allen-Bradley*, note 36, *supra*, as to mass picketing and picketing of homes. 315 U.S. at 748. Also see *Hanna Mining*, note 52, *supra*, upholding Wisconsin's injunction against peaceful economic weaponry to organize supervisors even if secondary violations also were present since the "central interests served by the Garmon doctrine were not endangered" and the supervisors were "outside the regime of the Act." *Id.*, 382 U.S. at 192-193. Also see *American Radio Assn v. Mobile Steamship Assn*, 419 U.S. 215, 95 S.Ct. 409, 413, 417, 42 L.Ed. 2d 399 (1974), sustaining Alabama's power to grant American shippers an injunction against picketing of foreign flag vessels even if the dispute with the American shippers were independent of the foreign dispute. Congress simply did not mean to intrude the Act into the accommodations of international maritime trade. See *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 115-116, 94 S.Ct. 959, 39 L.Ed. 2d 195 (1974).

The debate, therefore, had nothing to do with federal preemption of state interests. This is evident from the face of the reports. In addition, the same bill proscribed mass picketing and violence as well,/[108] neither of which specifically was included in

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/[97] *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

/[98] *Id.*, 361 U.S. at 483.

/[99] *Id.*, at 490-491.

/[100] *Id.*, at 492.

/[101] 336 U.S. at 253.

/[102] 361 U.S. at 492, note 23, next to last sentence.

/[103] 364 U.S. at 488.

/[104] See *Porter Co. v. NLRB*, 397 U.S. 99, 108, 90 S.Ct. 821, 25 L.Ed. 2d 146 (1970).

/[105] See *I, Legislative History of the Labor Management Relations Act*, 1947, p. 318.

/[106] *Id.*

/[107] "Under existing principles of law developed by the courts *and recently applied by the Board*, employees who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct... do not have any immunity under the act and are subject to discharge without right of reinstatement." *Id.*, 563. (Emphasis added.)

/[108] *Id.*, 204-205.

the final Act. The union's presumption that congress left all this to free economic warfare is wide of the mark. In short, congress was speaking to the scope of the Act, not federal-state relations.

The union misreads this court's construction of that legislative history. Michigan's strike vote requirement was unconstitutional because of its actual conflict with the Act and federal occupation of the field of strike activity, not because of failure of passage of a bill./[109] Similarly, the strike ban in *Street Employees*/[110] was unconstitutional because it denied a federally protected right, not because a bill failed of passage.

It is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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/[109] *International Union, Etc. v. O'Brien*, 339 U.S. 454, 457-458, 70 S.Ct. 781, 94 L.Ed. 978, n. 5 (1950).

/[110] *Amalgamated Asso. of Street etc. Employees v. Wisconsin E. R. Board (Street Employees)*, 340 U.S. 383, 71 S.Ct. 359, 95 L.Ed. 364 (1951).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

and

KEARNEY & TRECKER CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY AND TRECKER CORPORATION

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IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR RESPONDENT KEARNEY AND TRECKER CORPORATION

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin is reported at 67 Wis. 2d 13, 226 N.W. 2d 203 (1975), and reprinted in the Petition for Certiorari here (P.A-2ff).[1] The opinion of the Circuit Court for Milwaukee County and the decision of the Wisconsin Employment Relations Commission are not officially reported but appear in the Petition at P.A-15ff and P.A-22ff, respectively.

[1] References to pages of the Appendix of the Petition will be cited as "P.A- ". Pages in the single Appendix will be cited as "A.".

JURISDICTION

The jurisdictional requisites are adequately set forth in the Brief for Petitioners ("Pet. Br.").

QUESTION PRESENTED

May the State of Wisconsin prohibit a Union-directed concerted refusal to work overtime, a partial-strike activity which is neither protected nor prohibited by Federal law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in Appendix (*infra* p. 32).

STATEMENT

The Kearney & Trecker Corporation ("Kearney & Trecker" or "Employer") is engaged in the manufacture of machine tools at West Allis, Wisconsin. At all times relevant hereto, the hourly employees at Kearney & Trecker have been represented by Lodge 76, International Association of Machinists and Aerospace Workers ("Union" or "Lodge 76").

Prior to March 7, 1972, Kearney & Trecker employees represented by Lodge 76 had been scheduled for and had worked a "substantial amount" of overtime. (A. 21; P.A-32) In fact, on Saturday, March 4, 1972, approximately 354 employees worked overtime. (Co. Ex. 1; A. 33, 51; P.A-32) Although employees had previously been allowed, individually, to refuse overtime at the option of supervision, there had been no general, or concerted, refusal to do so. (R. 22, 24) Only five percent of the employees had consistently declined to work overtime. (A. 22; P.A-32)

On March 7, 1972, while negotiations for a new labor agreement[2] were continuing, the members of the Union met pursuant to notice from the Union and unanimously adopted a resolution directing that no member should work overtime, overtime being defined as working in excess of 7½ hours per day or 37½ hours per week. (A. 20, 25-26; P.A-31) On March 16, representatives of the Union "remind[ed]" its members that even though negotiations were still underway, the policies voted on by the members "will continue in effect until a labor agreement is signed" (A. 26-27; P.A-32). Despite requests from Kearney & Trecker, the Union declined to ask the membership to rescind the ban on overtime. From March 11, 1972 until July 23, 1972 no employees worked overtime (with the exception of the three employees who worked overtime on only one day), even though the Employer had scheduled many of the employees for overtime on numerous occasions during that period (A. 26, 28-29, 32; P.A-32, 33).

On June 12, 1972 the Employer filed a charge with the National Labor Relations Board ("NLRB") alleging, among other things, that the Union had violated Section 8(b)(3) of the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §158(b)(3) by its ban on overtime (Co. Ex. 7; A. 29, 55-59). On June 27, 1972 the NLRB Regional Director refused to issue a complaint on the ground that the Union's action was not

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[2] The prior labor agreement had expired on June 19, 1971 (P.A-26; A. 34), but the Union had not gone out on strike.

prohibited by the NLRA, citing this court's decision in *Insurance Agents.*[3] That refusal stated, in part:

> *"Dismissal by this Agency does not necessarily preclude the Charging Party [Kearney & Trecker] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."* (Co. Ex. 3; A. 33, 52-54). [Emphasis Supplied]

On June 15, 1972, the Employee filed a complaint with the Wisconsin Employment Relations Commission ("WERC") (A. 3-6). After a hearing, a WERC examiner found, on February 26, 1973, that the Union had authorized, encouraged and condoned the employees' concerted refusal to work overtime, that the effect of that action was to interfere with the Employer's production and that the Union had therefore violated Section 111.06(2)(h), Wis. Stats., which prohibits, *inter alia,* engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." (p. 32, *infra*) The examiner rejected the Union's challenge to the WERC's jurisdiction on the basis of this Court's decision in *Garmon,*[4] concluding that "a concerted refusal to work overtime is neither a protected activity under Section 7 [of the NLRA] nor a prohibited activity under Section 8 of the [NLRA]" (P.A-48). The WERC unanimously adopted the examiner's decision as its own on April 23, 1973 (P.A-22-23). On August 24, 1973 that decision was affirmed by the Circuit Court of Milwaukee County,

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[3] *National Labor Relations Board v. Insurance Agents' International Union, AFL-CIO,* 361 U.S. 477 (1960).

[4] *San Diego Building Trades Council, et al v. Garmon, et al,* 359 U.S. 236 (1959).

which also rejected Petitioner's pre-emption arguments on the basis of prior decisions of this Court (P.A-15-21).

The Union then appealed to the Wisconsin Supreme Court. On appeal, the Union did not deny that it had violated the Statute in question, but again argued that Wisconsin's authority to enjoin such conduct had been pre-empted by Federal law. Relying on prior decisions of this Court, including those in *Garmon,*[5] *Garner,*[6] and *Briggs and Stratton,*[7] the Wisconsin Court unanimously rejected the Union's argument, stating "since the conduct involved in this case is not protected, prohibited or contrary to any legislative purpose of the Federal Labor Act the judgment appealed from must be affirmed" (P.A-14).

SUMMARY OF ARGUMENT

The decision below should be affirmed on the basis of this Court's decision in *Briggs and Stratton* where the authority of Wisconsin to enjoin conduct *very similar* to the concerted refusal to work overtime here at issue and under the *very statute in question,* was upheld. Neither Congress nor this Court has rejected the basic holding of *Briggs and Stratton* — that the states may regulate conduct, such as that involved here, which is neither protected nor prohibited under federal law. As a result, Wisconsin has been able to remedy such unprotected, but coercive, conduct effectively without requiring that

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[5] See Note 4, *supra.*

[6] *Garner, et al v. Teamsters, etc. Local No. 776, et al,* 346 U.S. 485 (1953).

[7] *International Union, U.A.W., A. F. of L., Local 232, et al v. Wisconsin Employment Relations Board,* 336 U.S. 245 (1949), commonly referred to as "Briggs and Stratton".

remedy to be borne by employees caught between the Company and the Union.

Even in the absence of *Briggs and Stratton,* the right of Wisconsin to enjoin the Union's concerted refusal to work overtime would be clear under this Court's *Garmon* doctrine since such conduct is not even arguably protected or prohibited. The exception to *Garmon* set forth in this Court's decision in *Morton*[8] is inapplicable here since the requisite Congressional "focusing upon" the conduct in question is not present. Similarly, there has been no evidence of any congressional determination to oust state authority over this narrow area.

Although the conduct at issue is not even "arguably" protected, we submit that this Court should revise the *Garmon* rule to apply only to conduct which is actually protected. The present procedure has created an intolerable situation in which an employer faced with arguably protected conduct can only obtain a ruling on the nature of the conduct by intentionally taking actions which may constitute unfair labor practices and subject him to substantial liabilities.

ARGUMENT

I. THE AUTHORITY OF WISCONSIN TO ENJOIN A CONCERTED REFUSAL TO WORK OVERTIME IS FULLY SUPPORTED BY THIS COURT'S DECISION IN *BRIGGS AND STRATTON.*

Petitioners would deny Wisconsin the power to enjoin a concerted refusal to work overtime, a practice which has been denied the protection of Section 7 of the National Labor Relations Act in a long and unbroken line of decisions.[9] Yet, the authority of Wisconsin to do just that was settled by this Court in *Briggs and Stratton.*[10] There, the union had put pressure on the employer by calling a series of union meetings during working hours. The WERB[11] enjoined the union's action pursuant to Section 111.06(2)(h), Wis. Stats., (Pet. Br. 35) the *very statute* involved in this case. On appeal, this Court upheld Wisconsin's right to enjoin that conduct, stating (336 U.S. at 264-265):

> "We think this recurrent or intermittent unannounced stoppage of work to win unstated ends was *neither forbidden by federal statute nor was it legalized and approved thereby. Such being the case, the state police power was not superseded by congressional Act* . . . .
>
> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct *neither made a right under Federal Law nor a violation of it* and which has the coercive effect obvious in this device." [Emphasis Supplied]

The close similarity between the Union's conduct, here, and that in *Briggs and Stratton* is apparent. In both cases, the unions allowed their members to work *only a portion* of their normal hours. In both cases the union imposed severe economic pressure[12] on the em-

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[8] *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964).

[9] *E.g., John S. Swift Co.,* 124 NLRB 394 (1959), *modified and enf'd.* 277 F. 2d 641 (7th Cir. 1960); *Decision, Inc.,* 166 NLRB 464 (1967); *First National Bank of Omaha v. NLRB,* 413 F. 2d 921, 925 (8th Cir. 1969); *Prince Lithograph Co., Inc.,* 205 NLRB 110; *Valley City Furniture Co.,* 110 NLRB 1589 (1954); *Polytech, Inc.,* 195 NLRB 695 (1972).

[10] See Note 7, *supra.*

[11] The Respondent WERC was then known as the Wisconsin Employment Relations Board ("WERB").

[12] As a direct result of the Union's actions, Kearney & Trecker fell behind in deliveries, lost orders, incurred contract penalties, and was no longer in control of its own production (A. 43-46).

ployer without union members suffering the economic consequences of a strike. Both types of conduct have been repeatedly held to constitute unprotected partial strikes by the NLRB. E.g., *Valley City Furniture Co.,* 110 NLRB 1589 (1954) *enf'd.* 230 F. 2d 947 (6th Cir. 1956) (concerted refusal to work overtime); *Daniel A. Donovan, et al.,* 206 NLRB 688 (1973) (intermittent work stoppages); *Honolulu Rapid Transit Company,* 110 NLRB 1806 (1954) (intermittent work stoppages).

Moreover, the decision in *Briggs and Stratton* made clear that its holding was equally applicable to a concerted refusal to work overtime. In concluding that the work stoppages there were not protected by Section 7 of the NLRA, the Court cited "similar cases" holding "comparable work stoppages" to be unprotected, including *C. G. Conn, Ltd. v. NLRB,*[13] in which a *concerted refusal to work overtime* was held to be unprotected. 336 U.S. at 257.

Although subsequent decisions of this Court have declined to follow the "approach" of *Briggs and Stratton* under which the Court determined for itself the protected or prohibited nature of an activity, this Court has never abandoned its basic holding that states may enjoin partial strikes which are neither protected nor prohibited under Federal law. Rather, this Court has cited *Briggs and Stratton* with approval in several cases including *O'Brien,*[14] *Weber,*[15] and even the *Garner* de-

[13] 108 F. 2d 390 (7th Cir. 1939).

[14] *International Union, United Automobile, etc. Workers v. O'Brien,* 339 U.S. 454, 459 (1950).

[15] *Weber v. Anheuser-Bush, Inc.,* 348 U.S. 468, 476 (1955). There, Mr. Justice Frankfurter, the author of *Garmon,* noted cases in which the authority exercised by the state was found "not to have been exclusively absorbed by the federal enactments" including *Briggs and Stratton* where "[c]onduct was neither protected nor prohibited . . . and *thus was open to state control.*" [Emphasis Supplied]

cision relied upon by the Union. In *Garner* this Court, citing *Briggs and Stratton,* stated (346 U.S. at 488):

> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore is 'governable by the state or is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers."

More recently, the basic holding of *Briggs and Stratton* was reiterated by Mr. Justice White in his concurring opinion (joined in by The Chief Justice and Mr. Justice Stewart) in *Ariadne Shipping Co.*:[16]

> "The only possible dispute could be over whether the picketing was activity protected by Section 7 of the Act or whether the picketing was *neither protected nor prohibited by the Act and therefore was subject to state regulation or prohibition.*" [Emphasis Supplied]

Although *Garmon*[17] both amplified the protected-prohibited test set forth in the earlier cases, including *Briggs and Stratton,* and declined to follow its "approach", it did not disturb its substantive holding. In fact, the continued vitality of that holding was expressly confirmed by the concurring opinion of Mr. Justice Harlan, joined by three other Justices. He stated (359 U.S. at 253, n. 5):

> "The court may be correct in stating that 'the approach taken in [*Briggs and Stratton*] in which the Court undertook for itself to determine the status of the disputed activity has not been followed in later decisions and is no longer of general applica-

[16] *International Longshoremen's Association, Local 1416, AFL-CIO v. Ariadne Shipping Co., Ltd., et al,* 397 U.S. 195, 201 (1970).

[17] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

tion'. That, however, has nothing to do with the vitality of the holding *that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited.* To the contrary, that holding has remained fully intact, . . ." [Emphasis Supplied]

Briggs and Stratton is clearly on point and fully supports the decision of the Wisconsin Court in this case. Although announced over 26 years ago, *Briggs and Stratton's* basic holding has never been rejected either by Congress or this Court. No evidence has been presented to show that, during that long period, it has produced any imbalance in collective bargaining in Wisconsin or elsewhere. To the contrary, it has provided a method by which coercive, unprotected conduct can be remedied without resort to generally self-defeating, self-help measures which punish only the individual employee who has been directed to withhold his services and not the perpetrating union. We submit such methods are valuable and should be retained, and the holding of *Briggs and Stratton* reaffirmed.

II. THE AUTHORITY OF WISCONSN TO ENJOIN PETITIONER'S UNPROTECTED CONDUCT HAS NOT BEEN REMOVED BY THIS COURT'S HOLDINGS SINCE *BRIGGS AND STRATTON.*

The currently controlling test of Federal pre-emption was set forth in this Court's decision in *Garmon:*

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * *

> ". . . When an activity is *arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board* if the danger of state interference with national policy is to be averted." (359 U.S. at 244-245) [Emphasis Supplied]

However, a corollary to that holding is that of *Briggs and Stratton* — where conduct is neither *arguably protected nor prohibited* by federal law, state regulation is not precluded. See *Garner, et al v. Teamsters,* 346 U.S. at 488; *Weber v. Anheuser-Busch, Inc.,* 348 U.S. at 476; *San Diego Building Trades Council v. Garmon,* 359 U.S. at 253, n. 5 (Harlan, J. concurring); *International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co.,* 397 U.S. at 201 (White, J. concurring). Although we submit that the *Garmon* doctrine should not be applied to conduct which is only "arguably" protected, the authority of Wisconsin to enjoin this particular type of conduct is clear even under the full *Garmon* rule.

A. The Union's Concerted Refusal to Work Overtime Was Not Even Arguably Protected or Prohibited by Federal Law.

In *Briggs and Stratton* this Court held a partial strike, very similar to that here, to be neither protected nor prohibited and that holding is equally applicable in this case.[18] However, the unprotected nature of that activity has *also* been settled "with unclouded legal significance"

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[18] Although this Court has expressed concern as to the decision's holding regarding the §8 or "prohibited" issue because the matter was "not litigated seriously", no such reservation was expressed regarding the Court's holding that such conduct was not protected under §7. *National Labor Relations Board v. Insurance Agent's International Union, AFL-CIO,* 361 U.S. 477, 493-494, n. 23 (1960).

by the NLRB as well and not even the union[19] asserts that it was prohibited.

One of many decisions of the National Labor Relations Board holding a concerted refusal to work overtime to be beyond the protection of federal law is *Valley City Furniture Co.*, 110 NLRB 1589 (1954). There, as here, the union banned the working of overtime as a bargaining tactic. The Board stated (110 NLRB at 1594-1595):

> "We find that the partial strike (refusal of overtime) called by the Union from its very inception was the sort of *activity which, although concerted, is not,* as against the action by the Respondent, *entitled to the protection of the Act.* The vice in such a strike derives from two sources. First, the Union sought to bring about a condition, *that would be neither strike nor work.* And, second, in doing so, *the Union in effect was attempting to dictate the terms and conditions of employment . . .*" [Emphasis Supplied]

Accord: *John S. Swift Co., Inc.*, 124 NLRB 394 (1959), *modified and enf'd.* 277 F. 2d 641 (7th Cir. 1960); *Decision, Inc.*, 166 NLRB 464 (1967).

The Board only recently reaffirmed and explained this line of decisions in *Polytech, Inc.*, 195 NLRB 695, 696 (1972), stating:

> "The holding in *Swift* (*John S. Swift Co., supra*) that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the

[19] Petitioners also did not believe their conduct to be protected in the earlier stages of this case. In the Wisconsin Circuit Court, they not only did not argue in their brief that it was protected, they conceded "that a concerted refusal to work overtime is neither protected nor prohibited under the federal Act." (App. Cir. Ct. Br. 5). We believe their original position to have been the correct one.

> working day, *they are plainly unwilling to assume the status of strikers — a status contemplating a risk of replacement and a loss of pay.* The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform *all of the work they were hired to do.*" [Emphasis Supplied]

Such conduct has also been held to be unprotected by the U.S. Courts of Appeal. Thus, on this issue, the Eighth Circuit recently stated in *First National Bank of Omaha v. NLRB,* 413 F. 2d 921, 925 (8th Cir. 1969):

> "The test in each case is whether the employees have assumed the status of strikers. They cannot continue to work the regular hours of employment and refuse to work overtime."

Accord: *C. G. Conn, Ltd. v. NLRB,* 108 F. 2d 390 (7th Cir. 1939).

The Union insists, however, that overtime at Kearney & Trecker was totally optional and that as a result the employees' refusal to work overtime was protected conduct under the Board's decision in *Dow Chemical*[20] (Pet. Br. 28-30). We submit they are mistaken on both counts.

There was *no* contractual provision or practice at Kearney & Trecker which authorized a concerted or universal refusal of overtime or even granted an unlimited right of refusal to an individual. In fact, the then expired labor agreement between the parties contained *no* grant of *any right* to refuse overtime. Rather, Section 203 of that agreement (Jt. Ex. 1; A. 17, 50) expressly recognizes that:

> "[t]he direction of the working force including the right . . . to determine . . . the schedules and standards

[20] *Dow Chemical Co.*, 152 NLRB 1150 (1965).

> of production . . . is vested exclusively in the Company, . . ."

Similarly, Exhibit "J" to that agreement (Jt. Ex. 1; A. 17, 50-51) stated in Section 295:

> "Generally, when overtime is necessary a job has become critical and nothing can stand in the way of its completion."

Employees had, however, been allowed, *individually,* to refuse overtime (A. 22). Although one company witness did describe the acceptance of overtime as "optional" (A. 38-39), that same witness pointed out that "the option of overtime was given to the supervisor." (A. 24)

The conduct found by the Board to be protected in *Dow Chemical Co., supra,* was not a continued refusal to work overtime scheduled by the employer, but rather a one-time failure by employees to "volunteer" for extra duty. In fact, the Board in *Dow* expressly distinguished that case from a situation in which the employees "refused *scheduled overtime work.*" 152 NLRB at 1152 (emphasis is that of the NLRB).[21] Here, the overtime ban formally adopted by the Union, resulted in a four month refusal to work overtime, even though Kearney & Trecker did schedule many employees for overtime work on various occasions during that period. (A. 26, 28-29, 32; P.A-32-33).

Moreover, the employees in *Dow* apparently had no obligation whatsoever to volunteer for extra duty. In contrast, Kearney & Trecker had the right to schedule and to

[21] Petitioners erroneously state that Dow employees "were asked beforehand whether they wanted weekend work and were free to decline it." (Pet. Br. 28) "The practice at [Dow] was for employees who wished to volunteer for weekend work to indicate that fact to [Dow] on the Wednesday prior to the weekend," a distinction obviously important to the Board's decision. 152 NLRB at 1152, n. 3.

require overtime under its contract and there was no practice which authorized a concerted refusal such as that which occurred here. Moreover, overtime at Kearney & Trecker was not extra duty, it was simply part of the job. The employees here had traditionally worked a "substantial amount" of overtime and only five percent had consistently refused to do so.[22] (A. 21-22; P.A-32). In fact, over 350 had worked overtime on the Saturday before the Union's ban (Co. Ex. 1; A. 33, 51; P.A-32). By refusing to perform that scheduled work the employees were, at the direction of the Union, rather than by exercising their individual choice, refusing to "perform all the work they were hired to do" and thus engaging in unprotected conduct. *Polytech, Inc.,* 195 NLRB at 696.

The impact of a practice of having previously worked overtime is apparent from the NLRB's holding in *Decision, Inc.,* 166 NLRB 464 (1967) where, as here, the employees had "as a matter of practice worked overtime hours when needed." Holding their concerted refusal to work overtime to be unprotected, the Trial Examiner, whose decision was adopted by the Board, noted (166 NLRB at 479):

> "The employees involved had as a matter of practice worked overtime hours when needed. *The Respondent's business was geared to such a practice. Under such circumstances the working of overtime was a regular job function of the employees involved. The employees' refusal to work overtime constituted in effect a refusal to work or to strike as regards part of their working hours.* That the employees could have concertedly engaged in a total work stoppage is not in issue. The employees however, under the circumstances, were not entitled to have a partial work

[22] In such circumstances, there would have been no need to *force* employees to work overtime.

stoppage and to work part of the time." [Emphasis Supplied]

Similarly, in *John S. Swift Co.*,[23] the Trial Examiner found (124 NLRB at 412) that:

> "(1) . . . there was no rule, written or oral, requiring that overtime be worked on request, (2) it was not uncommon for employee to refuse to work overtime when requested by a supervisor; and (3) no discipline, discharges or threats of either had been visited upon employees thus refusing to work."

Nevertheless, the Board in *Swift* found a concerted refusal by these employees to work overtime to be unprotected, noting that "employees who were requested to work overtime normally did so in the absence of a valid personal excuse." 124 NLRB at 396. Although counsel for the NLRB attempts to distinguish *Swift* as a case where overtime was "required" (NLRB Br. 6), we submit that overtime was more voluntary in that case than here.

Moreover, the Union's concerted refusal to work scheduled overtime here would not have been protected under controlling Board precedent even if overtime *had* been voluntary and even in the *absence* of such a practice. In *Prince Lithograph Co., Inc.*, 205 NLRB 110 (1973), the union had, as in this case, imposed a ban on overtime as a bargaining tactic and an employee was discharged for complying with that ban even though overtime had been *expressly* made voluntary under the expired contract. The NLRB Administrative Law Judge flatly rejected the argument that the discharged employee's conduct was protected merely because overtime had been voluntary, noting

[23] 124 NLRB 394 (1959), *enf'd on this point*, 227 F. 2d 641 (7th Cir. 1960).

that the Board had only recently held[24] a secondary refusal to work voluntary overtime to be unlawful. He concluded[25] (205 NLRB at 115):

> "If an overtime strike, protected by a voluntary (contractual) right to refuse overtime, for an unlawful object constitutes a violation of the statute, it would appear to be equally true *that an overtime strike to bring economic pressure against a primary employer is unprotected despite the same contractual provision.*" [Emphasis Supplied]

The Board affirmed the Administrative Law Judge's decision "for the reasons given by him", and found that the employee had engaged "at the instance of the Union, in a partial strike by participating in a concerted refusal to work overtime", the identical situation presented here. 205 NLRB at 110, n. 2. The Board has often held activity denominated as a "partial" strike to be unprotected. See *Valley City Furniture Co., supra*, at 1594-1595 (refusal to work overtime); *Honolulu Rapid Transit Company*, 110 NLRB 1806 (1954); *Leprino Cheese Com-*

[24] The Administrative Law Judge in *Prince* relied upon Local No. P-575, *Amalgamated Meat Cutters, etc.*, 188 NLRB 5, where the Board stated at 6, "That the overtime was designated as voluntary in the contract does not, in our view, render the concerted refusal to perform it any the less a strike, or less coercive, *particularly where, as here, the uncontradicted evidence shows it had been the employees' practice to work overtime* during these hours for 5 months at New York, and for 5 years at Kelly." [Emphasis Supplied]

[25] As both the Union and counsel for the NLRB note in their briefs, the Administrative Law Judge determined, despite this conclusion, that the rfusal was "not unprotected" in *Prince* because the contract there *expressly* authorized a refusal by "any and *all*" employees and, since such tactics had been used for many years, clearly contemplated a *concerted* refusal, 205 NLRB at 115. He concluded that he could not ignore the parties' contractually expressed decision to allow this type of partial strike as a bargaining tactic. Of course, there was *no* such agreement at Kearney & Trecker, and it is that portion of his opinion quoted above and the NLRB's affirmance which are important here.

pany, 170 NLRB 601, 606, *enf'd.* 424 F. 2d 184 (10th Cir. 1970), *cert. den'd.* 400 U.S. 915 (1970).

Finally, the NLRB's[26] own Regional Director clearly suggested the availability of a state remedy *in this case,* stating in his June 27, 1972 letter (Co. Ex. 3; A. 33, 52-54):

> "*Dismissal by this agency does not necessarily preclude the Charging Party (Kearney & Trecker) from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act.*" [Emphasis Supplied]

The Regional Director would hardly have suggested other alternatives (i.e., state action) if activities protected by Federal law had been involved.

We submit that the foregoing demonstrates that the Union's actions were not even arguably protected. Of course, not even the Union maintains that its actions were prohibited and, in any case, such argument would be foreclosed by the Regional Director's refusal to issue a complaint (Co. Ex. 3; A. 33, 52-54), which was "illuminated by explanations" and by this Court's decisions in *Insurance Agents* and *Briggs and Stratton.* Being neither protected nor prohibited, there can be no pre-emption under the basic test set forth in *Garmon.*

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[26] In its *amicus* brief filed with this Court, counsel for the NLRB argues, inexplicably, that the conduct in question is arguably protected. The Board's argument is apparently based on the erroneous assumption that the overtime was purely "voluntary" as in *Dow.* If not, such argument is directly contrary to its own decisions, particularly *Swift, Decision, Inc.* and *Prince, supra,* and to the views of its Regional Director, who, unlike the Board, *was* provided with firsthand knowledge of the facts at issue.

B. The *Morton* Exception to the *Garmon* Test Has No Application Here and Should Not be Expanded.

Failing to meet the requirements for pre-emption established in *Garmon,* Petitioners would have this Court radically revise those requirements. Rather than accept this Court's frequent teaching that the Federal law "leaves much to the states",[27] petitioners would leave next to nothing. They would classify all economic weapons as prohibited, protected, or, if neither, as "permitted".[28] (See Pet. Br. 13). In *each* case, the states would be ousted from jurisdiction.

Petitioners' erroneously assert that this Court's decision in *Morton*[29] supports their far-reaching revision of the pre-emption requirements. There, the action was brought pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. §187, which authorized suit by any person injured as a result of specified secondary conduct

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[27] *Garner et al. v. Teamsters, Local No. 776, et al.,* 346 U.S. 485, 488; *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468, 480-481; *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 240.

[28] But see, *American Ship Building Co. v. National Labor Relations Board,* 380 U.S. 300, 338 (Goldberg J. concurring) where Justice Goldberg pointed out that the "choice [of economic weapons] is *not unrestricted*" and that "not all forms of economically motivated strikes are protected *or even permissible* under the labor statutes or the prior decisions of this court", citing *Briggs and Stratton.* (Emphasis added). Certainly, all economic weapons can not be unilaterally invoked by the *Employer.* For example, in *United States Pipe & Foundry,* 180 NLRB 325 (1969), *enf'd.* 442 F. 2d 742 (D.C. Cir. 1971) the Board precluded an employer, which concededly could have locked out its employees, from temporarily reducing benefits to exert pressure during bargaining. The Board examiner noted that the "tactic imposed hardship on the employees while enabling [the Employer] to continue operations without impediment . . . ." 180 NLRB at 328. Although the *same* unequal hardship exists in *this* case, the Board here, opposes utilization of the only effective remedy available.

[29] *Local 20, Teamsters, etc. v. Morton,* 377 U.S. 252 (1964).

prohibited by that Section. The Ohio Federal District Court found that the union had violated Section 303 by inducing and encouraging employees of a neutral employer to stop using the trucks of the plaintiff in order to force the neutral employer to stop doing business with the plaintiff. This Court affirmed that finding of a "clear violation of §303". 377 U.S. at 256.

The Union in *Morton* had, however, engaged in another instance of secondary activity, a direct approach by the Union to a neutral employer to persuade it not to do business with the plaintiff. Although finding that such activity was *not* in violation of Section 303 since the Union had approached the neutral employer directly,[30] rather than through its employees, the district court, nevertheless, awarded damages on the basis of state common law.

This Court reversed the latter award, even though assuming that at least some of the secondary activity involved was neither protected nor prohibited, noting (377 U.S. at 258):

> "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) *comprehensively* and with great *particularity* 'describes and condemns *specific union conduct* directed to *specific objectives.*'" [Emphasis supplied].

The Court concluded (377 U.S. at 259-260):

> "If the Ohio law of secondary boycott can be applied to proscribe the *same type of conduct* which Congress *focused upon but did not proscribe* when it enacted §303, the inevitable result would be to frustrate

[30] Section 8(b)(4) of the NLRA and Section 303 of the Labor Management Relations Act ("LMRA") have since been amended to specifically cover such conduct. P.L. 86-257, §704.

> the congressional determination to leave this weapon of self-help available." [Emphasis supplied].

Clearly, *Morton* is an exception to the basic "arguably" protected-prohibited test established in *Garmon,* in that it did deny state jurisdiction over certain conduct which was neither protected nor prohibited, It is, however, an exception and not the rule and is, by its very terms, applicable only where Congress has "focused upon"[31] the conduct in question without proscribing it. Although Congress has focused upon secondary boycotts in great detail, by specifically prohibiting certain well defined practices, there has been no comparable regulation of unprotected partial strikes like the crippling refusal of overtime that occurred at Kearney & Trecker.

Petitioners purport to find the requisite "focusing" in the failure of Congress, two years *before Briggs & Stratton,* to enact a proposed amendment to the NLRA which would have prohibited "calling, authorizing, engaging in or assisting — (A) . . . any sit down strike or other concerted interference with an employer's operations conducted by remaining on the employer's premises" and would have expressly removed that conduct from the protection of Section 7 of the Act.[32] Since the disruption at

[31] "Focusing" in *Morton* was not simply the Congressional regulation of some aspects of collective bargaining, economic pressure, or picketing, but rather its proscription of "specific union conduct directed to specific objectives" "comprehensively and with great particularity". 377 U.S. at 259-260. Neither the fact that Congressional Acts may govern the replacement of strikers, the lockout or other economic actions nor the fact that the Board has been called upon to determine whether certain tactics are protected even comes close to evidencing the focusing required by *Morton.* Such focusing *would* be present here if Congress had prohibited some partial strike tactics, without prohibiting a concerted refusal to work overtime.

[32] H.R. 3020 80th Cong., 1st Sess., § 7, 12, reprinted at *I Legislative History of the Labor Management Relations Act, 1947,* pp. 176, 204-205.

Kearney & Trecker came not from employees "remaining on the Employer's premises" but rather from their *refusal* to remain for the *full day,* it is apparent that this statute or provision would have had no application in *this* case even if it had passed.

A fuller examination of the very Conference Committee Report[33] relied on by the Union makes it quite clear that the failure of Congress to enact that proposal was definitely *not* based on a decision that "the federal balance warranted only employer self-help" as the Union suggests. (Pet. Br. 21). In explaining its failure to expressly excluded such conduct from the protection of Section 7, the Committee stated (H. Conf. Rep. at 39):

> "[T]here was real concern that the inclusion of such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act."

It is apparent that the Committee's goal was to *avoid sanctioning* any such conduct, not to restrict the forum in which it might be remedied.

The same Committee Report commented regarding Section 8(b)(1) of the Act (H. Conf. Rep. at 42): "[U]nions that engage in these practices to the injury of another may subject themselves to liability *under ordinary principles of law*", presumably in the civil courts. [Emphasis added]. Further, the Act, as reported by the Committee and enacted, included (A) Section 10(a), authorizing the NLRB to cede jurisdiction over disputes to state agencies, (B) Section 14(b) allowing the states to prohibit or regulate union shop provisions, (C) Section

[33] H. Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess., reprinted at *I Legislative History of the Labor Management Relations Act,* 1947, p. 547 ff.

301 allowing, *inter alia,* state courts to entertain suits for breach of collective bargaining agreements, and (D) Section 303 permitting suits to be brought in state courts to award damages for violations of Section 8(b)(4) of the Act. 29 U.S.C. §§160(a), 164(b), 185 and 187. Such comments and provisions[34] demonstrate no intent, either by that Conference Committee or by the Congress, to *exclude* states from the administration of the Federal Labor law, but rather a design that the states continue to play an active and important role.

Petitioner's assertion that this Court's decision in *Insurance Agents*[35] evidences a congressional intent that partial strike tactics be free of state as well as NLRB regulation is equally erroneous. The issue in *Insurance Agents* was limited to "the scope of the National Labor Relations Board's authority under Section 8(b)(3) of the National Labor Relations Act". 361 U.S. at 478. This Court's opinion was wholly concerned with the interpretation of the *Board's* limited authority under the statute and with the extent to which the use of similar disruptive tactics might be inconsistent with "good faith" bargaining. The decision does *not even discuss* federal pre-emption or state power.

Certainly, the fact that Congress did not grant the NLRB authority to prohibit such practices does not require the conclusion that such activity, which is beyond the protection of federal law, is also foreclosed to state regulation. After all, the same statute *expressly* authorized the states, but not the NLRB, to outlaw or restrict

[34] The Petitioner's statement that "Congress wrote only one provision §14(b), saving state power over the federally regulated subject matter" (Pet. Br. 16) is in error.

[35] *National Labor Relations Board v. Insurance Agents International Union,* 361 U.S. 477 (1960).

union security clauses and expressly provided for State court, but not NLRB, enforcement of collective bargaining agreements.

In short, there has been *no* Congressional action and *no* prior decisions of this Court, which would bar Wisconsin from enjoining the Union's concerted refusal to work overtime. We submit that there is no reason for this Court to impose such a ban at this time. The action by Wisconsin here neither interfered with the right to strike or engage in any other protected activity nor sought to regulate any activity prohibted by Federal law. Therefore, conflict, which is the touchstone for pre-emption, is simply not present. See *Amalgamated Ass'n. of Street, etc. Employees v. Lockridge,* 403 U.S. 274, 285-86 (1971). Wisconsin merely provided a more effective means of remedying a thus far seldom used tactic which, though concerted, has been found beyond the sweeping protection of Section 7. E.g. *John S. Swift Company, Inc., supra.*

Although such conduct is not protected by the Act, petitioners would nevertheless, have this Court confer upon it judicial "protection" by precluding Respondent from securing effective relief through a specialized state tribunal, the WERC, and by leaving to the Respondent, as its sole "defense", self-defeating,[36] self-help tactics.

[36] Although Kearney and Trecker could have suspended, discharged, or even locked out its employees, such steps would have only increased its already enormous production problems, exacerbated the already substantial strain on the bargaining process, and placed the employees in the middle between their union which was directing them not to work and management which would have been ordering them to do the work under threat of discipline. Through the WERC, Kearney & Trecker was able to obtain an order against the perpetrating union rather than the employees. We submit that the procedure utilized by the Employer is far more consistent with the Act's primary goal of reducing "industrial strife or unrest", than the self-help alternative. NLRA §1, 29 U.S.C. §151.

The direct result of the adoption of Petitioner's expansion of *Morton* would be the total elimination of state action in this area, including the beneficial procedure utilized here. We submit that such drastic action has not been sanctioned by Congress.

III. *GARMON'S* PRE-EMPTION OF CONDUCT ONLY ARGUABLY PROTECTED HAS CREATED A 'NO MAN'S LAND' WITHOUT A NECESSARY FORUM FOR JUSTIFIED EMPLOYER COMPLAINTS AND SHOULD BE ABANDONED.

Since the activities of the Petitioners were not even "arguably"[37] protected or prohibited, the right of Wisconsin to enjoin that conduct is clear. However, even if such conduct were "arguably" protected, overriding interests require, we submit, that the state nevertheless be permitted to act.

Employers faced with prohibited or arguably prohibited union activities at least may file a charge with the NLRB and obtain some determination of whether the conduct is prohibited in fact and, if it is, secure relief. In contrast, an employer faced with conduct which is "arguably protected" has no forum whatsoever to secure a determination whether such conduct is, in fact, protected or is unprotected: He cannot obtain relief from the NLRB, nor can he obtain a ruling from that agency — and he is even denied access to the courts and to state labor relations tribunals, such as the WERC.

[37] Of course, Wisconsin could not act if the conduct had been protected, a fact readily acknowledged by the Wisconsin Court (P.A. A-14).

The only avenue open to him under the current *Garmon* rule is resort to "self-help", hoping that the union files charges with Board.[38] If the employer guesses wrong and the union/employee conduct *is* ultimately found protected, the employer exposes himself to NLRB remedies for interference with protected activities and to possible tort claims — an intolerable price to pay for a determination of his rights.[39]

Not surprisingly, this aspect of *Garmon* has frequently been condemned by members of this Court[40] as well as by commentators.[41] In his dissenting opinion in *Lock-*

[38] The employer's plight in the "arguably protected" situation under *Garmon* was recognized by Mr. Justice White, concurring (with the Chief Justice and Mr. Justice Stewart) in *International Longshoremen's Association v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (1970):

> "If the National Labor Relations Act provided an effective mechanism whereby an employer could otain a determination from the National Labor Relations Board as to whether picketing is protected or unprotected, I would agree that the fact that picketing is 'arguably' protected should require state courts to refrain from interfering in deference to the expertise and national uniformity of treatment offered by the NLRB. *But an employer faced with 'arguably protected' picketing is given by the present federal law no adequate means of obtaining an evaluation of the picketing by the NLRB.* The employer may not seek himself a determination from the Board and is left with the unsatisfactory remedy of using 'self-help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice." (Emphasis supplied)

[39] For example, if the conduct, here, had been protected and the Company had suspended or discharged the participants, its liability might well have been huge.

[40] *International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (Mr. Justice White concurring, joined by The Chief Justice and Mr. Justice Stewart); *Amalgamated Association of Street etc. Employees v. Lockridge*, 403 U.S. 274 (1971) (Mr. Justice White dissenting, joined by The Chief Justice).

[41] Broomfield, "Pre-emptive Federal Jurisdiction over Concerted Trespassory Union Activity," 83 *Harv. L. Rev.* 552 (1970); Come, "Federal Pre-exemption of Labor-Management Relations: Current Problems in the Application of Garmon," 56 *Va. L. Rev.* 1435, 1444 (1970); Cox, "Labor Law Pre-emption Revisited," 85 *Harv. L. Rev.* 1337, 1363 (1972).

ridge, Mr. Justice White (joined by the Chief Justice) stated (403 U.S. at 328):

> "There seems little point in a doctrine that, in the name of national policy, encourages the commission of unfair labor practices, the evils which above all else were the object of the act. Surely the policy of seeking uniformity in the regulation of labor practices must be given closer scrutiny when it leads to the alternative 'solutions' of denying the aggrieved party a hearing or encouraging the commission of a putative unfair labor practice as the price of that hearing."

Similarly, Professor Archibald Cox observed:[42]

> "The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the 'arguably protected' rule shuts the door to determination of the question, and thus denies the hope of remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court. It seems unlikely that so unjust a formula can long survive unless shored up by other considerations."

The unfairness of this doctrine might be less staggering if the Federal Labor Law were, indeed, uniformly administered and interpreted. But, that is simply not the case. The exceptions to the "exclusive primary jurisdiction" of the NLRB are so numerous and so substantial as to almost swallow the rule. "To summarize, the 'rule' of uniformity which the Court invokes today is at

[42] Cox, *supra*, 85 *Harv. L. Rev.* at 1363. Professor Cox further noted, at 1339: "The weakness of the defense [of the *Garmon* test], coupled with changes in the Court's membership, suggests that the way may soon be open for wider application of state law of strikes and picketing. . . ." Another commentator has noted: "[T]here is a real possibility that the *Garmon II* rules are not secure. Four Justices dissented in *Lockridge*, and, as now constituted, it is not improbable that, given the proper vehicle, the Court will reexamine and reevaluate the *Garmon II* rules." 2 Kheel, *Labor Law*, §9.03, pp. 9-96 - 9-103 (1973). We respectfully submit that this case *is* the proper vehicle.

best a tattered one, and at worst little more than a myth." *Amalgamated etc. Employees v. Lockridge,* 403 U.S. at 318-319. (White, J. dissenting)

For example, both State and Federal courts have been expressly authorized in Section 301 of the LMRA (29 U.S.C. §185) to provide a remedy for the breach of collective bargaining agreements. This Court has recognized their right to do so even though the alleged breach may involve activity which is not only arguably but *actually* protected or prohibited by the Act. E.g. *Smith v. Evening News Assn.,* 371 U.S. 195 (1962). Similarly, both State and Federal courts are authorized by Section 303 of the Act (29 U.S.C. §187) to award damages for conduct violative of the highly technical provisions of Section 8(b)(4), of the Act.

Congress has also expressly authorized states to take jurisdiction where the Board has declined to do so because of the small effect on commerce,[43] authorized the Board to cede its jurisdiction to state agencies[44] and allowed states to regulate or outlaw union security provisions[45] even though such provisions are an extremely important issue in collective bargaining. Further, this Court has recognized the authority of the states to regulate conduct actually prohibited by the Act where such conduct involves issues "deeply rooted in local feeling and responsibility" or an alleged breach of a union's duty of fair representation. E.g. *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656 (1954) (violence); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (Defamation); *Taggart v. Weinackers, Inc.,* 397

[43] §14(c) NLRA, 29 U.S.C. §164(c)
[44] §10(a) NLRA, 29 U.S.C. §160(a)
[45] §14(b) NLRB, 29 U.S.C. §164(b)

U.S. 223 (Burger, C. J. concurring) (trespass); *Vaca v. Sipes,* 386 U.S. 171 (1967) (failure to fairly represent).

Finally, Congress, this Court and even the Board itself have approved substantial Board deferral to the arbitration process where the matter is arbitrable under the parties' collective bargaining agreement, even though the issue may involve an arguable or actual unfair labor practice. *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955); *Smith v. Evening News Assn.,* 371 U.S. 195 (1962); *Carey v. Westinghouse Electric Co.,* 375 U.S. 261, 272. See also *Collyer Insulated Wire,* 192 NLRB 837 (1971); §203(d), LMRA, 29 U.S.C. §173(d).

All these exceptions are presumably based upon the existence of interests deemed sufficient to override the perceived congressional goal of uniformity. In *Vaca v. Sipes, supra,* for example, this Court based its decision, at least partly, upon apprehension that the union member would have no forum for his allegations of unfair representation if the General Counsel were to decline to issue an unfair labor practice complaint. *Lockridge, supra,* at 314-5 (White, J. dissenting). In the case of arguably protected conduct, the lack of hearing is not merely a possibility, it is a reality.

Surely the policy of encouraging arbitration or of insuring an adequate forum for unfair representation cases can be no more compelling than providing an employer faced with arguably protected union conduct with

some hearing. As was noted by Mr. Justice White, (dissenting in *Lockridge,* 403 U.S. 330) :

> "The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result. There is precious little in the *Garmon* doctrine that justifies its existence as to §7 activities under this test. Certainly neither the evidence of congressional intent nor the presumed but overdrawn interest in uniformity is adequate to justify denial of a hearing."

The effect of the current "arguably protected" policy is to create a "no man's land" not unlike that in *Guss*[46] whereby just and meritorious causes are totally barred from any forum for the sake of a perceived goal of uniformity. We submit that this "no man's land" no more represents the intent of Congress, here, than did that created in *Guss.*

Accordingly the *Garmon* pre-emption rule, having already been subjected to many exceptions, should be altered and made inapplicable to activities which are only arguably and not actually protected.

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[46] *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (1957).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be affirmed.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article VI

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

NATIONAL LABOR RELATIONS ACT, AS AMENDED (61 STAT. 316, 29 U.S.C. §141, et seq.)

Section 7.

"Employees shall have the right * * * to engage in * * * concerted activities for the purpose of collective bargaining or other mutual aid or protection."

WISCONSIN STATUTES

Sec. 111.06. *What are unfair labor practices.*

* * *

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

* * *

"(h) To take unauthorized possession of the property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, AFL-CIO, and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. Both respondents urge that *Briggs-Stratton*[1] survives and controls this case, thus posing one important issue before this

[1] *International Union, UAW v. Wisconsin Employment Rels. Bd.*, 336 U.S. 245 (1949).

Court. In their effort to resurrect *Briggs-Stratton*, however, respondents make no attempt to square its reasoning with the reasoning of the Court's opinions in *Insurance Agents*[2] and its progeny,[3] trivialize the holding in *Morton*,[4] and miss the significance of the pertinent legislative history.

The Court in *Insurance Agents* did not say that it was overruling the *Briggs-Stratton* decision. But the fact of the matter is, as respondents' silence on the point apparently concedes, the rationale of *Insurance Agents* amounts to a total rejection of the reasoning in *Briggs-Stratton*.[5] None of the values underlying the premise that the availability of economic pressure devices is part and parcel of the process of collective bargaining to which the statute is committed can be secured unless the admonition against federal administrative regulation of the choice of economic weapons absent a particularized statutory mandate runs against the states as well. The claim that Congress limited the Board's authority over peaceful economic pressures in order to make room for the states to regulate them must be rejected out of hand.

Nor can the holding in *Morton* be trivialized as some narrow exception to state jurisdiction over peaceful collective bargain-

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[2] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960). Actually, the major premise in this reasoning originated in *Local 1976, United Bhd. of Carpenters, etc. v. Labor Board*, 357 U.S. 93, 99-100 (1958); "[T]he Taft-Hartley Act was, to a marked degree, the result of conflict and compromise among strong contending forces and deeply held views on the . . . appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."

[3] *Labor Board v. Drivers Local Union No. 639*, 362 U.S. 274 (1960). *Florida Power & Light Co. v. Int. Bhd. of Electrical Workers*, 417 U.S. 790, 805, n. 5 (1974).

[4] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

[5] Cf. *Scott Hudgens v. Labor Board*, — U.S. —, No. 74-773, *slip op.*, pp. 10-11.

ing weapons applicable only to permissible secondary pressures, either on its own terms or as construed subsequently by this Court. The opinion, for a unanimous Court, declares the broad principle that self-help collective bargaining weapons permitted, though not necessarily protected by § 7 of the federal statute, cannot be outlawed by the states without upsetting the balance of power between labor and management expressed in federal labor policy. Lawful secondary pressures simply illustrate weapons in this category; they scarcely exhaust it.[6] This Court has subsequently invoked the *Morton* principle with respect to state law regulating solely primary conduct[7] as well as to preempt state remedies which interfere with federal labor policy.[8] Moreover, *Morton* amounts to an elaboration of the *Garner* thesis, which addresses primary conduct and was most recently invoked for the proposition that the federal regulatory scheme leaves activities neither protected nor prohibited "to be controlled by the free play of economic forces."[9]

Respondent Kearney & Trecker's treatment of the 1947 legislative history acknowledges that Congress focused upon, and did not enact, a proposal to outlaw "concerted interference with an employer's operations conducted by remaining on the employer's premises" but argues that it would not have applied here because the employees, literally, left the "premises" at the end of each shift rather than work the overtime. However, since they returned to the premises for work the following day, it can scarcely be said with certainty that the proposal would *not* have

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[6] *E.g.*, the Supreme Court of Illinois has recently applied the *Morton* rule to an employer's weapon, i.e. the right to replace strikers. *Illinois v. Federal Tool & Plastics*, — Ill. —, — N.E. 2d —, 90 L.R.R.M. 2536.

[7] *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 663 (1974).

[8] *Connell Co. v. Plumbers, etc. Local No. 100*, 421 U.S. 616 (1975).

[9] *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

reached the conduct in question. More important, the language would clearly have encompassed "partial strike" activities such as slowdowns or intermittent strikes which respondents would have this Court equate with a concerted refusal to work optional overtime. Hence the apparent legislative determination to leave such peaceful concerted bargaining pressures to employer self-help would seemingly apply to the conduct in question here with even greater force.[10]

2. Regrettably, we find it necessary to correct certain factual representations and apparent distortions of the case law found in the opposing briefs. Respondents apparently dispute the optional nature of overtime work at Kearney & Trecker, claiming that the reasons for rejecting it had to be "acceptable to supervision" (Comm. Br., p. 6; cf. K & T Br., p. 2), that this employer had the "right . . . to require overtime under its [expired] contract" (K & T Br., p. 15) and that overtime was "not extra duty [but] simply part of the job" (*Id.*). However, the record evidence is all to the effect that overtime was completely optional (A. 22, 23, 39), that it could be rejected for good reason or no reason at all (A. 23), and that management proposals to change the overtime practice so that it would become "part of the regular work schedule" and mandatory "excepting for reasons acceptable to supervision" were rejected, and the practice of optional overtime maintained during the entire course of this dispute (A. 61-62, 25, 38-39). Thus it simply cannot be said that in collectively exercising their right to reject overtime work these employees were imposing their own conditions of employment on the employer.

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[10] Contrary to the respondent employer's contention (Br., p. 22) it is the reasons given for not outlawing the conduct, rather than the reasons given for not expressly excluding it from § 7, that are material to this issue here. Moreover, since the conduct in question here is concededly not prohibited by § 8(b)(1), we fail to see any significance to the fact that the legislative history indicates that violent or tortious conduct in breach thereof may also be subject to redress under ordinary principles of law.

Kearney & Trecker's effort to show that the unprotected nature of the conduct here has been settled with unclouded legal significance seems seriously flawed. The recitation of the facts in *Decision, Inc.*, 166 NLRB 464, fails to mention that the employees in question, immediately prior to discharge, had been *ordered* to work the overtime and told they would be *fired* if they refused (*id.* at 478-479). Again, in *John S. Swift Co.*, 124 NLRB 394, 397, the Labor Board took pains to point out that the prior practice had been *changed* and the employees discharged for having *defied* what they understood to be an order to work the overtime, under pain of discharge. Far from supporting respondents' theory, these cases in fact demonstrate the critical differences between conduct the Labor Board holds unprotected and concerted activity, as here, that will be ruled within § 7 protection.

3. Respondents' arguments are, at bottom, a rejection of the federal labor policy which contemplates the exercise of peaceful economic pressure to resolve collective bargaining deadlocks. None of them justify the application of state law, serving no interest deeply rooted in local feeling and responsibility, to alter the balance of power struck by Congress with respect to peaceful collective bargaining weapons. Respondent employer concedes the availability of an arsenal of self-help options of its own to counter the peaceful concerted activity of its employees but rejects them as "self-defeating", preferring state injunctive relief as the "only effective remedy available" (K & T Br., p. 24, n. 36; p. 19, n. 28). Self-help was no remedy, K & T concedes, because such steps "would have only increased its already enormous production problems" (*Id.*, at 24). Respondent employer, in other words, lacked sufficient relative bargaining strength to secure acceptance of its demands; that is what its arguments in favor of state jurisdiction come down to. To permit the "balance of bargaining advantage to be set" by state law rather than "economic power realities" is, we respectfully submit, the very

antithesis of the congressional policy manifest in the federal statute[11] and repugnant to Article VI, Cl. 2 of the Constitution of the United States.

CONCLUSION

For the foregoing reasons as well as those set forth in our initial brief, the judgment below should be reversed.

Respectfully submitted

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[11] *Labor Board v. Burns' Security Services*, 406 U.S. 272, 288 (1972).

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OCTOBER TERM, 1975

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v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The decision of the Supreme Court of Wisconsin in this case involves the extent to which the National Labor Relations Act, 29 U.S.C. 151 *et seq.* ("NLRA"), preempts state labor laws; it thus has a direct im-

pact on the administration of the NLRA. The court below held that state law prohibits union inducement of the employees of an employer subject to the NLRA to engage in a concerted refusal to work voluntary overtime for the purpose of supporting the union's contract demands. For the reasons stated below, permitting the State to proscribe the use of that economic weapon in collective bargaining negotiations upsets the balance which Congress has struck in the NLRA between the legitimate rights of labor and management. The decision below is thus inconsistent with national labor policy. The National Labor Relations Board is responsible for administering the NLRA and implementing the national labor policy promulgated by Congress therein. For these reasons, it has a significant interest in seeking a reversal of the decision below.

STATEMENT

The facts are fully set out in the opinion below and in the petition (Pet. App. A-2—A-4; Pet. 3-7). In brief, they show that during negotiations for a new collective bargaining agreement, Kearney and Trecker Corp. ("Employer") sought to lengthen the basic work week—after which work was compensated at overtime rates—from 37½ hours to 40 hours. The Union (Lodge 76 and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO, petitioners herein) objected, and a bargaining impasse developed. The Employer then announced its intention of implementing the 40-hour week, and the Union countered by enacting resolu-

tions prohibiting any member from working overtime, *i.e.* in excess of 37½ hours a week.[1] Until agreement on a new contract was reached, almost all the members of the Union refused to accept daily or weekend overtime but otherwise performed their normal duties. (Pet. App. A-2—A-3, A-26—A-27, A-31—A-33.)

The Employer did not implement the announced 40-hour work week.[2] During the contract negotiations, it filed a charge with the Regional Director of the National Labor Relations Board alleging that the Union's overtime ban violated Section 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(3). The Regional Director dismissed the charge on the ground that the Act did not prohibit the Union's conduct. (Pet. App. A-3—A-4, A-17, A-40—A-41; App. 52-54.)

The Employer also filed a complaint with the Wisconsin Employment Relations Commission alleging that the Union's conduct violated Section 111.06(2)(h), Wis. Stat. Ann., which prohibits engaging "in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." The state agency found that the Union had violated the statute and ordered it to cease and desist from authorizing, encouraging, and condoning any concerted employee refusal

---

[1] By custom and understanding, acceptance of overtime work by the employees had always been voluntary (Pet. App. A-32; App. 22, 24, 39).

[2] Nor did the Employer discipline the employees for refusing to work overtime (Pet. 5; App. 39).

to work overtime, and to take certain affirmative action to insure the nonrecurrence of such activity (Pet. App. D). The state courts enforced this order, rejecting the petitioners' contention that the state law was preempted by the NLRA (Pet. Apps. B, C).

ARGUMENT

1. *International Union, UAW* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (*Briggs-Stratton*), was decided in 1949 when the doctrine of NLRA preemption was in its infancy. It held that the Wisconsin Employment Relations Commission (WERC) was empowered to bar a union from instigating certain intermittent and unannounced work stoppages.[3] The Court, finding that such activity was neither prohibited by Section 8 nor protected by Section 7 of the NLRA, concluded that it was governable by the State. Subsequent decisions, however, have so substantially limited and eroded *Briggs-Stratton* that

[3] *Briggs-Stratton* presented quite a different factual situation from that here. The employees here simply refused to volunteer to work overtime, in order to enforce their demand that the hours of work not be changed; there, the union repeatedly called special meetings during working hours "without warning to the employer or notice as to when or whether the employees would return" (336 U.S. at 249), and the employer was not informed of any of the union's bargaining demands. Moreover, the strike in *Briggs-Stratton* was far from peaceful—"there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the State's power to police coercion by those methods" (*id.* at 253).

it can no longer be deemed to have continuing validity.

Thus, in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246, the Court held that:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> * * * In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * * The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.[4]

[4] Under the *Garmon* test, there has been no "clear determination" by the Board that the conduct here is unprotected by Section 7. It is at least "arguably protected." The Wisconsin Supreme Court interpreted the Board's decision in *Prince Lithograph Co.*, 205 NLRB 110, as holding that "a concerted refusal to work scheduled or requested overtime is not protected, even if that overtime is voluntary" (Pet. App. A-12). In fact, the Board in *Prince* found that the employees there had a right to refuse to work overtime and that in exercising this right on a concerted basis, they "did not engage in unprotected activity." 205 NLRB at 115. It simply further held that the employer had a countervailing right to replace the partial strikers, as any other strikers, in order to get the job done. *Id.* at 110, n. 2, *Prince* is thus entirely consistent with

Referring to *Briggs-Stratton*, the Court added: "The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application" (*id.* at 245, n. 4).[5]

Dow Chemical Co., 152 NLRB 1150, in which the Board found that the employees' refusal to volunteer for overtime work was protected activity. The Board reasoned that, "since the employer had already agreed to permit employees to decide for themselves whether they wished to work on weekends," it could not be said that they were seeking to impose their own terms of employment by refusing to volunteer for overtime (152 NLRB at 1152). The situation in *Dow* was distinguished from another line of cases, *John S. Swift Co.*, 124 NLRB 394, enforced as modified, 277 F.2d 641 (C.A. 7), and *Honolulu Rapid Transit Co., Ltd.*, 110 NLRB 1806, on the ground that in the latter cases the employees' activities were unprotected because they refused to perform required overtime work, and thus attempted to alter the conditions of their employment (152 NLRB at 1152). The overtime work in the instant case was also voluntary, and the Wisconsin Supreme Court conceded that "[t]here may be a question as to whether *Dow* is in fact distinguishable" (Pet. App. A-11).

[5] In *Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274, the Court reaffirmed *Garmon*. It explained that "varying approaches were taken by the Court in initially grappling with this pre-emption problem," including having the Court undertake "a thorough scrutiny of the federal Act to ascertain whether the state courts had, in fact, arrived at conclusions inconsistent with its provisions," citing *Briggs-Stratton*. "[N]one of these approaches proved satisfactory, however, and each was ultimately abandoned" in favor of the *Garmon* approach, since each of the old methods "sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application." *Lockridge, supra*, 403 U.S. at 290-291.

In 1960, this Court again considered a case involving a concerted refusal of employees to perform part of their usual work, *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477.[6] The issue there was whether the Board properly found that such conduct constituted a refusal to bargain in good faith in violation of Section 8(b)(3) of the NLRA. In holding that the conduct did not violate the Act, the Court adopted not only a more comprehensive approach to the preemptive scope of the NLRA than was evident in *Briggs-Stratton* (361 U.S. at 493, n. 23), but also a new attitude toward so-called partial strikes, the specific conduct involved in both cases. In *Insurance Agents'* the Court reconsidered the relation of partial strikes to fundamental national labor policy. It emphasized (361 U.S. at 489):

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. * * * [A]t the present statutory stage of our national labor relations policy, the two factors —necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms—exist side by side. * * *

---

[6] The union sponsored such concerted on-the-job activities as refusing to solicit new business, reporting late, leaving at noon as a group, and refusing to perform customary duties (361 U.S. at 480-481).

The rationale of *Insurance Agents'* is inconsistent with the conclusion of the court below that the States may prohibit the use of such economic pressures, although the Board may not (Pet. App. A-19). Since the Board cannot act as arbiter of the propriety of the use of economic weapons in furtherance of the national labor policy (see 361 U.S. at 490),[7] there is no room for the States to do so in furtherance of individual state labor policies. See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 669 (1961).

2. This Court has frequently recognized that, in the labor relations field, "[t]he federal regulatory scheme (1) protects some activities, * * * (2) prohibits some practices, and (3) leaves others to be controlled by the free play of economic forces." *National Labor Relations Board* v. *Nash-Finch Co.*, 404 U.S. 138, 144. Thus, in *Garner* v. *Teamsters, etc., Local No. 776*, 346 U.S. 485, and *Teamsters Union* v. *Morton*, 377 U.S. 252, this Court recognized that activity which was neither specifically protected nor specifically prohibited by the NLRA was nonetheless preempted from state regulation because Congress intended to leave it unregulated. See also *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382, n. 17; Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1347-1348, 1352 (1972).

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[7] See also *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300, 317-318; *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 741, n. 7; *Florida Power & Light Co.* v. *Electrical Workers*, 417 U.S. 790, 805, n. 16.

Even if, as the court below concluded (Pet. App. A-14), this total preemption of state regulation applies only in certain specific areas where there is clear congressional intent to leave the activities free of governmental restrictions, *Insurance Agents'* teaches that partial strikes used as economic weapons during contract negotiations are within such an area.[8] Thus, partial strikes are one of the "economic pressure devices" (361 U.S. at 489) which the NLRA contemplates will be available. They are therefore beyond the reach of state regulation, regardless of whether they are arguably within Section 7 or 8 of the Act.[9]

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[8] Nor does *Hanna Mining Co.* v. *District 2, Marine Engineers*, 382 U.S. 181 (Pet. App. A-8—A-9), support the state court's assertion of jurisdiction here. In that case, this Court held that the NLRA did not preclude a state court from enjoining picketing by a union to obtain representation rights on behalf of supervisors. The state court was authorized to enjoin the picketing there because such restraint was consistent with national labor policy, and was neither arguably protected nor arguably prohibited by the Act. The objective of the picketing in *Hanna* was to pressure the employer to recognize and bargain with a union of supervisors. This was contrary to the national labor policy of leaving employers free from compulsion to recognize and bargain with a supervisors' union. The state court injunction furthered that policy by relieving the employer of such union pressure.

In contrast, the relief granted by the state court here is in derogation of national labor policy, since it prohibits activity which the federal Act has left free, thereby frustrating the congressional determination to leave this economic weapon available (*Insurance Agents', supra*) and upsetting the balance of power in labor disputes which Congress has struck.

[9] In light of the fundamental tenet of national labor policy affirmed in *Insurance Agents'*—that the non-violent use of

3. Finally, preemption is appropriate here since this case involves no state interest that is "deeply rooted in local feeling and responsibility." *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 228 (Burger, C.J., concurring). See, *e.g.*, *UAW* v. *Russell*, 356 U.S. 634 (violence); *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (malicious libel).[10] The State has not applied a law of general applicability, which only tangentially touches the interests of parties to a labor dispute. Rather, it has applied a labor relations statute that is predicated on an evaluation of the same interests that Congress considered and balanced in formulating national labor policy. See *Cox*, *supra*, 85 Harv. L. Rev. at 1352-1356. The State's contrary evaluation of those interests thus directly conflicts with federal policy and creates the very problem that the doctrine of preemption is designed to avoid.

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economic weapons during contract negotiations should not be subject to government regulation—the conduct at issue here is preempted even if it is not affirmatively protected by Section 7. Accordingly, the problem which troubled Mr. Justice White in *Longshoremen's Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 201, and *Lockridge*, *supra*, 403 U.S. at 325-328—whether *Garmon* should be applied in situations in which an employer confronted with "arguably protected" conduct has no fully adequate means of obtaining a determination whether it is in fact protected—is not presented by this case. Protection *vel non* is here simply not the question upon which preemption turns.

[10] Neither does it present a conflict, such as occurs in the foreign flag cases, where the Court has to balance the competing interests of national labor policy and international maritime law. See, *e.g.*, *Windward Shipping (London) Ltd.* v. *American Radio Ass'n*, 415 U.S. 104.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1975

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND KEARNEY & TRECKER CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* in support of the position of the petitioners is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 110 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

STATEMENT OF THE CASE

A collective agreement between the Kearney & Trecker Corp. and Local Lodge 76, International Association of Machinists covering hourly employees at the Employer's

machine tool plants in Milwaukee, Wisconsin terminated on June 19, 1971. On March 1, 1972, after the negotiations for a new contract had reached impasse, Kearney & Trecker announced that on March 13 it would unilaterally put into effect one of its bargaining demands rejected by the Union. In accord with 17 years of past practice the prior contract had provided for a 7½-hour basic work day, Monday through Friday, and a 37½-hour basic work week. The Company proposed to substitute an 8-hour basic work day and 40-hour basic work week. From the employee standpoint, since overtime work had always been optional, this would have instituted an adverse change in working conditions, and since premium overtime rates were paid for hours worked in excess of the basic work day or work week, Kearney & Trecker's proposed action would also have effected a cut in pay.

In response, at a meeting on March 7, the Union's members unanimously passed resolutions that no member should work overtime, defined as over 7½-hours per day and 37½-hours per week. And, all but a few Union employees continued to work on the terms previously established but refused to accept the overtime work proffered. Kearney & Trecker did not put the 8-hour day and 40-hour week into effect, nor did the Employer take any action against the employees who refused to accept overtime assignments. Instead Kearney & Trecker filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that the employees' concerted activity was unlawful under Wisconsin law. The WERC agreed and its order "enjoining [the] concerted refusal to work overtime" was affirmed by the Wisconsin Supreme Court. (See Pet. App. A. 3-A. 4, A. 5.)

ARGUMENT

The Wisconsin Supreme Court believed that the concerted activity here was akin to the "partial or 'quickie' strike" at issue in *Auto Workers* v. *Wis. Board,* 336 U.S. 245 ("*Briggs & Stratton*"), and that the principle governing this case is the one stated in *Briggs & Stratton*: "Policing of such conduct is left wholly to the states." (See Pet. App. A. 14, quoting 336 U.S. at 253.) But, as we now show, *Briggs & Stratton* is no longer good law.

1. There are two measures this Court has utilized to determine whether the National Labor Relations Act, as amended, displaces State law. The first is the principle of general application, initially applied in this context in *Hill* v. *Florida,* 325 U.S. 538, 542, that even where a State has jurisdiction to decide a case it may not do so in a manner that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines* v. *Davidowitz,* 312 U.S. 52, 67." (See also, e.g., *Bus Employees* v. *Missouri,* 374 U.S. 74; *Teamsters Union* v. *Morton,* 377 U.S. 252; *Linn* v. *Plant Guard Workers,* 383 U.S. 53; *Nash* v. *Florida Industrial Commission,* 389 U.S. 235; *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653; *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616.) The second is the principle that the National Labor Relations Board (NLRB) has exclusive primary jurisdiction over a case in which the activity complained of "is arguably subject to § 7 or § 8 of the Act * * *" (*San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245).

The Wisconsin Supreme Court focused on the question of whether *Briggs & Stratton* survived the restatement of the exclusive primary jurisdiction doctrine in *Garmon.* We

submit that the interests at stake are more clearly exposed by considering whether the *Briggs & Stratton* holding can be squared with the definitive statement of the federal labor policy as to the use of peaceful economic weapons in support of a negotiating position set forth in *Labor Board* v. *Insurance Agents,* 361 U.S. 477 and its progeny.

2.(a) In *Briggs & Stratton*:

> "[T]he Union had negotiated collective bargaining agreements, the last of which expired on July 1, 1944. Negotiation of a new one reached a deadlock and bargaining sessions continued for some time without success.
>
> "On November 3, 1945, its leaders submitted to the Union membership a plan for a new method of putting pressure upon the employer. The stratagem consisted of calling repeated special meetings of the Union during working hours at any time the Union saw fit, which the employees would leave work to attend. It was an essential part of the plan that this should be without warning to the employer or notice as to when or whether the employees would return. The device was adopted and the first surprise cessation of work was called on November 6, 1945; thereafter, and until March 22, 1946, such action was repeated on twenty-six occasions. The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them." (336 U.S. at 249.)

The company filed a complaint with the Wisconsin Employment Relations Board the end result of which was a court order which "for[bade] individual defendants and members of the Union from engaging in concerted effort to interfere with production by doing the acts instantly involved." (*Id.* at 250.)

As the Wisconsin Supreme Court recognized here (Pet. App. A. 14), the theory which formed the basis for this Court's affirmance of the *Briggs & Stratton* order was that:

> "While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. * * * There is no existing or possible conflict or overlapping between the authority of the federal and state Boards, because the federal Board has no authority either to investigate, approve or forbid the union conduct in question." (336 U.S. at 253-254.)

This distinction between the "purposes" for which economic force may be employed—which *Briggs & Stratton* recognized to be the concern of the NLRA—and the "methods" utilized—which were deemed the sole concern of the States—survived for only one year. *Automobile Workers* v. *O'Brien,* 339 U.S. 454, presented the question of whether "the strike vote provision of the Michigan labor mediation law" which called "for a notice given 'In the event the parties . . . are unable to settle any dispute' to be followed by mediation, and if that is unsuccessful by a strike vote within twenty days, with a majority required to authorize a strike" (*id.* at 455, 458), could be squared with the regime for settling industrial disputes created by the NLRA. The State's "labor mediation law" plainly regulated the "method" by which economic force was applied by establishing preconditions to the use of the strike, and not the "purposes" being pursued. Nevertheless, a unanimous Court overturned the Michigan statute:

"Congress [has] safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. It established certain prerequisites, with which appellants complied, for any strike over contract termination or modification. §8(d). These include notices to both state and federal mediation authorities; both did participate in the negotiations in this case. In provisions which did not affect appellants, Congress forbade strikes for certain objectives and detailed procedures for strikes which might create a national emergency. §§8(b)(4), 206-210. None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation." (*Id.* at 457; footnotes omitted.)

O'Brien was followed in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383. There the Court found the State's Public Utility Anti-Strike Act, which "substitute[d] arbitration upon order of the [Wisconsin] Board for collective bargaining whenever an impasse is reached in the bargaining process [a]nd, to insure conformity with the statutory scheme, • • • denie[d] to utility employees the right to strike" (*id.* at 388), incompatible with the NLRA:

"In 1947 Congress enacted special procedures to deal with strikes which might create national emergencies. Respondents rely upon that action as showing a congressional intent to carve out a separate field of 'emergency' labor disputes and, pointing to the fact that Congress acted only in respect to 'national emergencies,' respondents ask us to hold that Congress intended, by silence, to leave the states free to regulate 'local emergency' disputes. • • • [C]ongressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows

that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. *Automobile Workers* v. *O'Brien, supra,* at 457." (*Id.* at 393-394.)

In sum "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme[;] • • • a state law which denies that right cannot stand under the Supremacy Clause of the Constitution." (*Bus Employees* v. *Missouri,* 374 U.S. 74, 82.) Thus, the States are foreclosed from regulating both the "methods" utilized and the "purposes" pursued when that weapon of economic force is employed.[1]

(b) In *O'Brien* Chief Justice Vinson sought to harmonize the result reached there and in *Briggs & Stratton* by narrowing the rationale of the earlier case:

"The employees' conduct [in *Briggs & Stratton*] was 'a new technique for bringing pressure upon the employer,' a 'recurrent or intermittent unannounced stoppage of work to win unstated ends.' [336 U.S.] at 249, 264. That activity we regarded as 'coercive,' similar to the sit-down strike held to fall outside the protection of the federal Act in *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and to the labor violence held to be subject to state police control in *Allen-Bradley Local* v. *Wisconsin Board,* 315 U.S. 740 (1942). In the Wisconsin *Auto Workers* case, we concluded that the union tactic was 'neither forbidden by federal statute nor was it legalized and approved thereby.' 336 U.S. at 265." (339 U.S. at 459.)

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[1] The continued vitality of *Briggs & Stratton's* recognition that the NLRA supersedes state law regulating permissible strike purposes is attested to, e.g., by *Teamsters Union* v. *Oliver,* 358 U.S. 283; *Connell Co.*, 421 U.S. at 635-637.

Thus, the "intermittent unannounced work stoppage", the "sit-down strike" and "labor violence" were deemed to constitute a single category of conduct which was subject to state authority on the ground that it "fall[s] outside the protection of the federal Act," and not on the theory, put to rest in *O'Brien*, that the States are entirely free to regulate the range of methods by which the parties to collective bargaining apply economic force. But the subsequent development of the law has invalidated the assumption that these three types of conduct are alike; indeed, the post-*O'Brien* cases demonstrate that Congress, in establishing the federal labor policy, has regarded physical force (the "sit-down strike" and "labor violence") and peaceful economic force (including "intermittent unannounced work stoppages") as opposites.

As both *Briggs & Stratton* and *O'Brien* recognize, from the outset the uniform understanding has been that the NLRA does not sanction the use of physical force. Thus,

> "State jurisdiction • • • [over] conduct marked by violence and imminent threats to the public order • • • has prevailed • • • because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." (*Garmon*, 359 U.S. at 247.)

In contrast there can now be no doubt that the "partial or 'quickie' strike" (Pet. App. A. 14) is part and parcel of the system of free collective bargaining created by the NLRA and that the States are therefore without authority to enjoin the use of that peaceful weapon of economic force. The decisive precedent is *Insurance Agents*. The conduct that gave rise to that case paralleled the concerted activity at

issue in *Briggs & Stratton*:

> "In January 1956 Prudential and the union began the negotiation of a new contract to replace an agreement expiring in the following March. Bargaining was carried on continuously for six months before the terms of the new contract were agreed upon on July 17, 1956. • • •
>
> "The union • • • announced in February that if agreement on the terms of the new contract was not reached when the old contract expired, the union members would then participate in a 'Work Without a Contract' program—which meant that they would engage in certain planned, concerted on-the-job activities designed to harass the company. • • •
>
> "[T]he union's harassing tactics involved activities by the member agents such as these: refusal for a time to solicit new business, and refusal (after the writing of new business was resumed) to comply with the company's reporting procedures; refusal to participate in the company's 'May Policyholders' Month Campaign'; reporting late at district offices the days the agents were scheduled to attend them, and refusing to perform customary duties at the offices, instead engaging there in 'sit-in-mornings,' 'doing what comes naturally' and leaving at noon as a group; absenting themselves from special business conferences arranged by the company; picketing and distributing leaflets outside the various offices of the company on specified days and hours as directed by the union; distributing leaflets each day to policyholders and others and soliciting policyholders' signatures on petitions directed to the company; and presenting the signed policyholders' petitions to the company at its home office while simultaneously engaging in mass demonstrations there." (361 U.S. at 479-481; compare 336 U.S. at 249 quoted p. 4 *supra*.)

However, the path to this Court followed in the two cases differed. In *Insurance Agents* the employer filed its complaint with the NLRB rather than with a state agency. The Board upheld that complaint, ruling that the union's tactics constituted a violation of the obligation to bargain in good faith imposed by §8(b)(3) of the NLRA. This Court reversed.

Mr. Justice Brennan began by stating the basic postulates of the collective bargaining system embodied in the NLRA:

> "[T]he policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. • • • But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences. • • •
>
> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. • • • The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. • • • [A]t the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side." (361 U.S. at 488-489.)

Insurance Agents then states the rule of statutory construction entailed by the philosophy of free collective bargaining as follows: Condemnation of the use of a peaceful economic weapon

> "involves an intrusion into the substantive aspects of the bargaining process—• • • unless there is some specific warrant for [that] condemnation of the precise tactics involved • • •. [For] if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. • • • [But o]ur labor policy is not presently erected on a foundation of government control of the results of negotiations.
>
> • • • •
>
> "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. But the activities here involved have never been specifically outlawed by Congress. • • • [I]t is [therefore] clear to us that the Board needs a more specific charter than §8(b)(3) before it can add to the Act's prohibitions here." (*Id.* at 490, 498-499.)

The necessity in *Insurance Agents* of defining the scope of §8(b)(3) of the Act provided the occasion for the Court to articulate the central role in the statutory scheme of the permission to employ "economic pressure devices" (*id.* at 489) during bargaining negotiations. But subsequent decisions establish that the principle declared informs the entire Act and not simply that one provision. See, e.g., *Labor Board* v. *Drivers Local Union*, 362 U.S. 274, 282-283 (applying the *Insurance Agents* rationale in holding that §8(b)(1)(A) does not provide a predicate for prohibiting "recognitional" strikes); *American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 316-318 (applying that rationale in

holding that §§ 8(a)(1) and (3) do not provide a predicate for prohibiting bargaining lockouts); *Florida Power & Light* v. *Electrical Workers,* 417 U.S. 790, 805 n.16 (applying that rationale in holding that § 8(b)(1)(B) does not provide a predicate for prohibiting union fines levied on supervisor members for engaging in rank and file struck work).

In *Florida Power & Light,* Mr. Justice Stewart stated in precise and summary form the method of approach inaugurated in *Insurance Agents* and followed without deviation since:

> "In light of the fact that 'Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions,' *NLRB* v. *Drivers Local Union No. 639,* 362 U.S. 274, 282-283 (1960), the [Act is to be read as an] admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate • • •. *NLRB* v. *Insurance Agents,* 361 U.S. 477, 490 (1960)." (417 U.S. at 805 n. 16.)

(c) The short of the matter is this: The centerpiece of the Act is the "process of collective bargaining [which] leave[s] the results of the contest to the bargaining strengths of the parties." (*Porter Co.* v. *NLRB,* 397 U.S. 99, 108.) To insure the integrity of that process the Act contains an "admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate." (*Florida Power & Light,* 417 U.S. at 805.) As *Insurance Agents* holds, there is no "particularized statutory mandate" condemning the use of the "partial or 'quickie' strike." Thus, prohibition of that peaceful form of economic force is contrary to the most basic principle of the Federal labor policy.

In *Teamsters Union* v. *Morton,* 377 U.S. 252, 258, it was "the respondent's contention • • • that since the petitioner union's peaceful conduct was neither arguably protected under § 7 nor arguably prohibited under § 8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct." The Court replied:

> "But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers* v. *O'Brien,* 339 U.S. 454, 457. • • • The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines,* 372 U.S. 714, 722." (*Id.* at 258-259.)

Morton's elaboration of the reason why application of Ohio's law of secondary boycotts would "frustrate the purposes of the federal legislation" can be accurately paraphrased to demonstrate that the same conclusion follows here:

> "The type of conduct to be made the subject of [injunctive relief] was considered by Congress, and [the Act] comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.' • • • In selecting which forms of economic pressure should be prohibited by [the NLRA], Congress struck the 'balance . . . between the

uncontrolled power of management and labor to further their respective interests,' • • • by 'preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes • • •'.

"In this case, [as *Insurance Agents* holds, the Union's conduct] was not proscribed by the Act. • • • This weapon of self-help, permitted by federal law, formed an integral part of the [Union's] effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. • • • If the [Wisconsin law] can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [the NLRA], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (*Id.* at 259-260.)

The authority of *Briggs & Stratton* "must [therefore] be regarded as having been worn away by the erosion of time • • • and of contrary authority." (*United States* v. *Raines,* 362 U.S. 17, 26.) All that remains of that decision is the truth that "It is elementary that what Congress constitutionally has been given, the state may not constitutionally take away." (336 U.S. at 254.)

3. Relying on "Briggs and Stratton [as] authority for [its] position" the Wisconsin Supreme Court dismissed *Insurance Agents* as a "case [that] merely holds that the NLRB had no power to regulate strike tactics and left regulation of strike tactics to the states" and that "distinguishes between the power of the states to deal with

strike tactics and the power of NLRB to deal with strike purposes." (Pet. App. A. 10.)

We have already noted (pp. 5-7) that, 25 years ago, in *Automobile Workers* v. *O'Brien, supra* and *Bus Employees* v. *Wisconsin Board, supra,* this Court had rejected the theory stated in *Briggs & Stratton* that the NLRA "left regulation of strike tactics to the states." And, nothing this Court has said or done since has breathed any life into that discredited view.

The other aspect of the reasoning of the court below—that *Insurance Agents* "merely holds" that the NLRB, as opposed to other tribunals, has "no power to regulate strike tactics"—stands on no firmer footing.

In *Howard Johnson* v. *Hotel Employees,* 417 U.S. 249, a case arising under § 301 of the Act, Mr. Justice Marshall noted that *NLRB* v. *Burns Security Services,* 406 U.S. 272, had

> "emphasized that freedom of collective bargaining—'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'—was a 'fundamental premise' of the federal labor laws, *id.,* at 287, quoting *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99, 108 (1970), and that it was therefore improper to hold Burns to the substantive terms of a collective-bargaining agreement which it had neither expressly nor impliedly assumed" (*id.* at 254-255);

and that

> "The courts below held that *Wiley* [v. *Livingston,* 376 U.S. 543] • • • [whose] reasoning was to some extent inconsistent with [that of *Burns*] • • • rather than *Burns* was controlling here on the ground that

Burns involved an NLRB order holding the employer bound by the substantive terms of the collective-bargaining agreement, whereas this case, like *Wiley*, involved a § 301 suit to compel arbitration" (*id.*).

And, the *Howard Johnson* Court squarely rejected the conception that there is one national labor policy in Board cases and another in court cases: the "basic policies found controlling in an unfair labor practice context may [not] be disregarded by the courts in a suit under § 301" for that would "permit the rights enjoyed by the • • • employer • • • to depend upon the forum in which the union presses its claims." (*Id.* at 256.)

Insurance Agents, like *Burns*, states a postulate derived from the "'fundamental premise' of the federal labor laws • • • freedom of collective bargaining." In both instances the rule of law announced confined the NLRB, not to denigrate its authority, but to assure that conduct Congress intended to leave unregulated would be free. The *Insurance Agents* opinion concludes:

> "It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. • • • To be sure, then, Congress might be of opinion that greater stress should be put on the role of 'pure' negotiation in settling labor disputes, to the extent of eliminating more and more economic weapons from the parties' grasp, and perhaps it might start with the ones involved here; or in consideration of the alternatives, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point, and with only § 8(b)(3) to lean on, we do not see how the Board can do so on its own." (361 U.S. at 500; footnote omitted.)

Plainly then, the State courts, with only State law to lean on, cannot on their own move to a point, in eliminating more and more economic weapons from the parties' grasp, beyond the one Congress has occupied. If they do so they act in a manner that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hill*, 325 U.S. at 542.) Moreover, freeing the States to act in this manner would "permit the rights enjoyed by the • • • [union] • • • to depend on the forum in which the [employer] presses its claims." (Cf. 417 U.S. at 256.) Finally, since *Garner* v. *Teamsters Union*, 346 U.S. 485, 489, it has been understood that:

> "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal • • •."

It is therefore contrary to the entire thrust of this Court's decisions to read *Insurance Agents* as granting to the State courts the sole authority to regulate the central and sensitive subject of "strike tactics." Thus, here as in *Howard Johnson*, the court below erred in "disregard[ing] • • • the basic policies found controlling in an unfair labor practice context" (417 U.S. at 256).

The Wisconsin Supreme Court's failure to appreciate the full impact of *Insurance Agents* caused it to misunderstand also the controlling significance of *Morton*:

> "In Morton the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory treatment of secondary boycotts, Congress has not 'focused upon' partial or 'quickie' strikes. Policing of such conduct is left wholly to the states." (Pet. App. A. 14.)

In *Morton* the Court relied on its holding in *Carpenters Local* v. *Labor Board,* 357 U.S. 93, 99, that "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees," as support for its conclusion that in regulating the secondary boycott Congress intended to permit the use of the economic weapon the Teamsters Union employed there. While §§ 8(b)(4) & 303 embody one important facet of the national labor policy, they sound a secondary and not the primary theme.

Here, the holding in *Insurance Agents* that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. But the activities here involved have never been specifically outlawed by Congress. * * * [I]t is [therefore] clear to us that the Board needs a more specific charter than § 8(b)(3) before it can add to the Act's prohibitions" (361 U.S. at 498-499), supports the conclusion that in regulating the primary strike Congress intended to permit the "partial strike."

Moreover, the statutory treatment of the secondary boycott is far less comprehensive than the NLRA's regulation of primary labor disputes which are the Act's main concern. As we have stressed throughout, the focus of the Federal labor policy is the system of free collective bargaining and the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties [which] is part and parcel of [that] system" (*Insurance Agents,* 361 U.S. at 489). The primary conduct Congress intended to prohibit is described with particularity in §§ 8(a), 8(b) & 8(d). The intent to preserve all the peaceful weapons

of economic pressure not there condemned is explicitly stated in §§ 7 & 13 and is implicit in the entire statutory scheme. Thus, here as in *Morton,* if the State were permitted

> "to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [the NLRA], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy." (377 U.S. at 260.)

CONCLUSION

For the above stated reasons, the decision below should be reversed.

Respectfully submitted,

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